FIRST GROSS NATIONAL HAPPINESS & LAW CONFERENCE

SELECTED WORKS

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FIRST GROSS NATIONAL HAPPINESS & LAW CONFERENCE

JIGME SINGYE WANGCHUCK SCHOOL OF LAW

17-18 JULY 2018

Selected Papers

Introduction

On 17-18 July 2018, JSW School of Law (JSW Law) held its inaugural conference, titled **Gross National Happiness & Law**, at the Royal Institute for Tourism and Hospitality in Upper Motithang, Thimphu. Planning for this conference began more than three years prior, when it was originally conceived as the inaugural public event for Bhutan's first (and only) law school. The United Nations Development Programme (UNDP) and the Austrian Development Agency (ADA) generously contributed to the realization of this important project. Our ambition was to position the institution as a vibrant resource for the justice sector as a partner and as a laboratory for exploring new ideas related to the law, governance, and social progress.

The topic flowed naturally from JSW Law's institutional mandate, to focus on the intersection between the rule of law and Bhutan's unique GNH development strategy. This was intended to be the first in a series of conferences under the broad theme of GNH and the Law.

The Conference was structured as a series of Keynote speeches and five moderated panels, spread across two days. It coincided with the tenth anniversary of Bhutan's 2008 Constitution. Thus, the substantive orientation of the conference tended towards Constitutional legal issues, and the roster of speakers prominently featured several of the Constitution's architects.

The opening of the conference was graced by the Honourable President of JSW Law, Her Royal Highness Princess Sonam Dechan Wangchuck. After the important customary Bhutanese rituals and prayers were offered, the Dean of JSW Law, Sangay Dorjee, welcomed the panelists, guests, and participants. Following the Dean, JSW Law's Honourable President spoke of her view of the Bhutanese concept of "happiness," describing it as inextricably linked to the rule of law.

The first panel concerned "Defining Bhutanese Customary Legal Traditions." The discussion was moderated by *Dasho* Lobzang Rinzin Yargay, the

Director-General of the Bhutan National Legal Institute (BNLI). The first panelist to speak was *Dasho* Kinley Dorji, former Secretary of the Ministry of Information and Communication (MoIC), who spoke about the intellectual and historical origins of GNH. Associate Professor Rinzin Wangdi from JSW Law spoke about the first wave of codification of Bhutanese laws in the 1950s, before the arrival of a more "globalized" lexicon of legal transplants into Bhutan. *Dasho* Lungten Dubgyur, a High Court Justice and a member of the Constitutional Drafting Committee, described waves of legal transplants that have increasingly come to define Bhutan's legal and legislative landscape. Finally, *Dasho* Karma Ura, President of the Centre for Bhutan Studies and GNH Research, presented a provocative critique of Bhutan's current legal system from a GNH perspective. *Dasho* Karma invited Bhutan's legal community to internalize GNH "as part of its customary law […] in [the country's] policies, both in society and court procedures."

The second panel focused on Bhutan's Constitution and GNH's role as a guiding constitutional principle. The panel was moderated by Michael Peil, the Vice Dean of JSW Law. *Lyonpo* Sonam Tobgay, the first Chief Justice of Bhutan and the Chairman of the Constitutional Drafting Committee shared with the audience his first-hand recollection of the drafting process, emphasising the broad consultation process. Next, Nima Dorji of JSW Law presented a survey of the use of the term "happiness" in the constitutions of the world. Dr. Stefan Hammer of the University of Vienna drew upon the European experience to discuss the potential for Bhutanese public interest litigation to "enforce" the government's mandate to promote conditions favourable to the achievement of GNH. Subsequently, Dr. Wolfram Schaffar, formerly of the University of Vienna, talked about alternative development strategies in other parts of the world, and the implications for lawyers in nations implementing these development strategies. Finally, *Dasho* Tashi Wangmo, Eminent Member of the National Council, spoke of Bhutan's achievements cementing the rule of law.

The day concluded with Vice Dean Michael Peil and Kristen DeRemer, Head of Research at JSW Law, announcing JSW Law's plans to conduct a groundbreaking two-year ethnographic "Legal Needs Assessment" in all parts of Bhutan. Ms. DeRemer also spoke of JSW Law's new Research Centre.

The second day marked the 10th anniversary of the entry into force of Bhutan's Constitution. The current and former Chief Justices of Bhutan shared their insights into the first ten years of constitutional democracy in Bhutan. *Lyonpo* Sonam Tobgye described the fundamental principles that inspired the Constitution, and the importance of Bhutan's transition to democracy being "evolutionary, not revolutionary."

The conference's third panel, moderated by Dr. Michaela Windischgraetz of the University of Vienna, explored Buddhist influences on Bhutan's legal system. Professor Rebecca Redwood French of the University at Buffalo (USA) explored whether there is such a thing as a "Buddhist Law tradition," but noted that this tradition today might only be studied and developed here in Bhutan. *Khenpo* Sonam Bumdhen from the Central Monastic Body described the relationship between happiness, law, and Buddhism. Next, *Khenpo* Ngawang Sherab Lhundrup and Dorji Gyeltshen, both of JSW Law, presented on the relevance of *Nyenga* (poetry) and *Tsema* (logic) in the education of Bhutanese lawyers. Lastly, *Dasho* Shera Lhundrup, Attorney General of Bhutan, discussed the practical realities of observing Buddhist legal ethics as a practicing lawyer.

The fourth panel discussion of the conference focused on JSW Law's approach to teaching and learning. The discussion was moderated by Sangay Dorjee, the Dean of JSW Law. Jeremy Webber of the University of Victoria (Canada) described his university's dual law degree in common law and "traditional" First Nations' law. He highlighted the intellectual challenges that also informed the creation of JSW Law's curriculum. Vice Dean Michael Peil next presented JSW Law's pedagogical and curricular approach to create a fundamentally Bhutanese and GNH-centric law school curriculum. Pema Wangdi

and Dema Lham, both of JSW Law, then spoke of the fundamental relevance of humanities and clinical legal education, respectively, in the pedagogy at JSW Law.

The final panel, moderated by Stephan Sonnenberg, Assistant Dean for Clinical and Experiential Education at JSW Law, focused on legal capacity building collaborations across national and cultural boundaries. *Dasho* Kinley Dorji, *Dasho* Tashi Wangmo, and Dean Sangay Dorjee, along with Nick Booth from UNDP in Bangkok, spoke of the challenges and opportunities of working in cross-cultural and multi-national intellectual environments, and of the importance of managing relationships in such environments.

Lyonpo Tshering Wangchuk, Chief Justice of Bhutan, delivered the closing address, reminding the audience that "the Rule of Law is not [just] an added legal doctrine, but [rather] the foundation of a free, fair and just society; a guarantee of responsible government, and an important contributor to economic growth which invariably contributes to securing peace and cooperation."

The organizers would like to thank Tshering Dendup *(JSW Law, Class of 2023)*, Sonam Wangzom *(JSW Law, Class of 2022)*, Sangay Dorji *(JSW Law, Class of 2022)*, and Rinchen Dema *(JSW Law Faculty Assistant)* for their excellent contributions to these conference proceedings.

Keynote Address

HRH Princess Sonam Dechan Wangchuck, President, JSW Law

Honourable Prime Minister, Distinguished Guests, Eminent Speakers and Participants, Ladies and Gentlemen, I am delighted to be with you. Scholars and friends of Jigme Singye Wangchuck School of Law, we celebrate today the tenth anniversary of Bhutan's Constitution and democracy.

Bhutan's last decade from 2008 to 2018 is a symbolic and historic era that began with our peaceful transition from Monarchy to Constitutional Democracy. This transition was the culmination of three decades of patient preparation. Such mindful planning in pursuit of carefully chosen ends reflects the way we have functioned and managed to achieve our many successes. His Majesty the King's leadership in the building of democratic and legal institutions during this crucial time, in support of our young democracy, has led us to the where we are.

Creation of the Law School

As we move forward as a vibrant and modern democracy, the Rule of Law plays a significant and ever-increasing role. His Majesty has emphasized that to create a just and content society, we must set in place the strong standards of the Rule of Law. Legal education is the foundation, and it is an indispensable and vital component of such a society.

Name of the Law School

We take the name of our school–Jigme Singye Wangchuck--from our Great Fourth–the father of our Constitution and Democracy. It is His leadership, His excellence, and His unshakable reputation that inspired us to name the school. As our Nation's conscience, it is in His name that we are pledged to uphold our sacred Constitution and that we aspire to achieve the goals of Gross National Happiness.

Curriculum

JSW Law's maiden conference on Gross National Happiness and Law is a significant one. Law and Happiness are not often seen to happily coexist, rather they are relegated to opposite ends of the room!

This bold step is just the beginning of what we propose for JSW Law. We definitely didn't take the easy route. We decided that a truly organic and unique curriculum was needed for our Law School. Through years of planning, and consultation with stakeholders both within and outside Bhutan, we have developed a curriculum that is ambitious, but both attainable and sustainable.

The curriculum has been devised to facilitate our research mission. JSW Law will serve as a think tank to support the democratic institutions of Bhutan, including the Parliament, the Judiciary, Civil Society Organizations, and the Executive branch. Through our outreach programs and original faculty scholarship, we hope to initiate and lead global conversations among the current and future generations of lawyers and leaders as to how the concept of GNH & Law might be applied across national borders. Our curriculum and our research strive for nothing short of establishing and institutionalizing mutual co-existence in Bhutan and across the world, and to explore how law can facilitate the happiness of society.

Our mission is to become a leader and a voice in our region first, and one day to have a global voice to address the many challenges of our times.

Ladies & Gentlemen!

At JSW Law, every student will be required to take mandatory courses on environmental law, sustainable development and law, to explore the interaction of law, religion, and culture, and to develop the field of Gross National Happiness and law. We believe in the quality of our curriculum, and we are confident of producing generations of future leaders who will take their responsibility seriously

and carry out fundamental duties with Justice, Service, and Wisdom.

Our curriculum will focus upon three key areas that will be honed to propel the global need for GNH & Law, with a clear vision for universal happiness, sustainable economic development, and choices that protect and conserve our environment.

If I may tell you a bit about these three areas:

Law & Happiness

Happiness is a subjective concept which is difficult to define. Simply put, happiness is feeling safe and protected: this is also the sole purpose of our laws and policies. Happiness is deeply rooted in Bhutanese society, since the time of our founder, Zhabdrung Ngawang Namgyel, who said, *"the law must promote happiness for all sentient beings.*"

His Majesty the Great Fourth promulgated the profound concept of Gross National Happiness, with the belief that the wellbeing and contentment of our people should not be forsaken while pursuing development for Bhutan. This is now forever engraved in our sacred constitution, which states that we "*shall strive to promote those conditions that will enable the pursuit of Gross National Happiness."* This makes clear that the purpose of modern government, law, and policy must be to pursue the conditions that create the happiness of society and our people.

With this important meeting of minds, we begin the conversation today. We will soon break further ground, through our research and curriculum, to put this mission fully into practice – first in Bhutan, and then in the rest of the world. JSW Law will become a beacon of light that will draw others to our pristine and fertile environment, to be inspired and united in purpose to create better, just, and content societies.

Law & Environment

Today, we are witnessing unprecedented global environmental change as well as diminishing global bio-diversity: two signs of sure and imminent danger to our survival and the future.

Bhutan is possibly the only country which imposes a constitutional duty on its government and its citizens to preserve our natural environment through the adoption and support of environmentally friendly laws, practices, and policies. In particular, the Constitution requires that a minimum of sixty percent of our country's land be maintained under forest cover at all times. In addition, Bhutan's Constitution makes each Bhutanese a trustee of our natural resources, and environment.

This is our strength, and its wisdom endows us with the means to give JSW Law great purpose and meaning.

Law & Sustainable Economic Development

Sustainable development is an important pillar of GNH. For us, it means utilization of limited natural resources in a sustainable manner for the benefit of present and future generations.

Our Constitution has charted out the means to achieve and maintain inter-generational equity through sustainable economic development by requiring the Parliament to enact environmental legislations to ensure sustainable use of natural resources. This principle is reflected in our Law School, in its sustainable and energy saving architectural designs, and in the core focus of our course curriculum.

JSW Law will deliver on His Majesty Jigme Khesar Namgyel Wangchuck's vision to transform the legal profession, building a culture of research and legal education, and cultivating fertile grounds for a strong and vibrant democracy.

We have been very fortunate to receive support from organizations lead by people who are present here today. This shows your continued support in our endeavours. Thank you!

We will depend on our existing goodwill and institutional linkages, both within and outside the country, to ensure a diverse and extraordinarily committed faculty and dynamic team who will play their parts in the Law School.

It is with certainty that I say, JSW Law will prepare future leaders who can promote the profound philosophy of law and happiness, sustainable economic development and environmental conservation. We have much work ahead of us, and if we work together in unity and purpose, we can achieve this noble and worthy cause.

Thank you!

Codification of Laws in Bhutan in the 1950s

Rinzin Wangdi[1]

IntroductionRespected scholars from the religious body, Ministers, distinguished guests from different countries, legal professionals of Bhutan, and all the students: Greetings to everyone present here today. Although I don't have much confidence, knowledge, or experience, I would like to thank the organisers of the conference and JSW Law for giving me this opportunity to be the first speaker among the *Rigzhung* presenters. I want to share my experience and knowledge, as well as the skills that I have gained from my many years of working in the Justice sector.

Introduction to Buddhist Law

As noted by our Honourable President, Her Royal Highness, the main source of correlation between the law and Gross National Happiness is that, for GNH to exist, there must be law as a root for peace and well-being. The law is not only the root of peace and well-being, but it is also the main cause of short-term welfare and long-term happiness. As residents of a Buddhist kingdom, we have always enjoyed well-being and happiness because all our laws were grounded in, and all our issues were dealt with, consistent with Buddhist principles. I would like to give a brief introduction to the law related to Buddhism in our country.

The 253 monastic disciplines (*Vinaya*) taught by Lord Buddha were broadly categorised into three moral disciplines:

1. Refraining from wrongdoings, such as the ten non-virtuous acts;
2. Gaining virtue by listening, contemplating, and practising virtuous qualities; and
3. Benefiting other beings by action for the sake and benefit of others.

[1] Associate Professor, JSW School of Law

Among three moral disciplines, "refraining from misdeeds" can be understood as the basis of all enlightened secular laws. In fact, I feel that practising this discipline is one of the ways to perfect living.

Definition and characteristics of Buddhist law

In general, Buddhism defines the law as Justice, and Justice is considered to be like the Sun which shines in every corner across the Earth. Legal principles must be impartial and without discrimination, for as Mepham Wangpo stated, "There is no discrimination in the Law." He also said, **"**The law is impartial, as straight as that of a line in the sky and a law that manifests the cardinality of cause and effect is the law of all living beings**."**

The natural state of law that gets along worldly living.

A fundamental principle of Mahayana Buddhism is that law should not only punish with penalties, but also correct the wrong act and seek to improve it. As such, any hope of improving poor behaviour or conduct depends on the law. The *Lhoi Choejung*,[2] stated that "the rise and fall of the Buddha-dharma are contingent on the severity of the law." The *Sutra of the Sacred Golden Light*[3] adds, "For the benefit of the self and others, govern a land through sublime dharma; and those who are found deceitful, condemn them adequately but justly."

The Sutra and Tantra teaches us to follow the path of enlightenment without regard for self-interest; all followers of Buddhism should carry this thought continuously. In the legal context, it has been said that one should punish the guilty, even if he is one's own child and likewise support one's enemy, if he or she is right. The proper role is, of course, dependent upon one's place in society. The king can attain enlightenment by administering laws justly, while the ordinary

[2] The history of Bhutan, written by the tenth *Je Khenpo, Penchen* Tenzin Chogyal, in the 18th century.
[3] The *Suvarṇaprabhāsa Sūtra*, circa 500 CE.

person can achieve enlightenment by being an obedient subject. In this regard, it has been said that "A sinner can't be freed by a spiritual master just as the ruler can't acquit a criminal."

Combination of spiritual and mortal life

It is often believed that the spiritual and mortal life are contradictory, but Buddhism teaches that there is always a possibility for the two to be combined. Nagarjuna said, "The heavenly realms are not far for those who practice righteous activities of humans; and liberation is closer still for those who ascend the staircases of both God and Humans."

Longchhen Rabjam stated, "As those that have liberated from *Samsara* did attain liberation by practising good deeds of gods and humans, it is important to practice such sublime dharma." To follow the superior religious means that to achieve the comfort of human being and God, one should follow the perfect theory of the worldly living and then slowly practice the way to achieve the virtue of liberation. The only difference is whether one begins early or late. The means to get enlightenment through both day-to-day living and Buddhism is also one of the origins of law.

The Origin of the Law

It is believed that during the formative period of the universe and primitive human society, food and other resources were originally in great abundance, but were depleted due to increased human population and their avarice and greed. During this period, there was no proper institution of law: might made right, and the state of nature was a state of perpetual war, a war of all against all. The notion of private property emerged as a means of protecting against theft, murder, robbery, and other *mala in se* crimes.

The humans met together and decided to appoint one man among them to maintain order, in return for a share of the produce of their fields and herds. That

man was *Mangpos-Bkurbai rGyalpo*, the "king elevated by many." He became the first king of the world, and accordingly, he introduced rules–laws–into the world.

One of his first acts was to divide the fields among all, giving each an equal share. For this reason, he was called *Zhingpoen* ("leader of the fields"), and the rules and systems he enacted are commonly called "Zhingpoen's Law." This is believed to be the emergence of law in the world.

The *Choejung Khepai Gaten* relates, "The wise people met together and chose the Zhingpoen from amongst them: one with great pearls of wisdom, good manner, great strength and good physique, to maintain order in return for a share of the produce of their fields and herds. He was known as *Mangpos-bKurbai rGyalpo,* and the King elevated by many. He was the first King in the World."

Earliest Law of the Kingdom of Bhutan

It is difficult to obtain an accurate account of early Bhutanese history. Research suggests that the existence of law in Bhutan dates back at least to a code of law which prevailed during King Melong Dhong, who was an incarnation of the Lord Buddha. There also existed laws formulated by *Dzongpons* (local leaders), and of course the seven teachings which assisted in peaceful conduct of debate amongst the disciples of the Buddha. Scholars also point to the mediation by Guru Rinpoche of the civil war between King Sindhu Raja of Bumthang and Naochhe as evidence of the existence of law in Bhutan as early as the eighth century.

In the 13th century, the great Buddhist scholar Kuenkhen Longchhen Rabjam wrote, in his *An Ode to the Sacred Place of Bumthang*, "May the people live in nobility in accordance to the ancient laws, May joyous occasions and celebrations prevail in this valley." The above demonstrate the prevalence of harmony and peace under law at least since the advent of Bhutan as a nation.

***Zhabdrung*'s Code of Law**

It is said that *Zhabdrung* Ngawang Namgyel, the 17th century founder of Bhutan, "introduced laws where there had been no southern laws and fixed handles where there had been no handles on pots." Upon his arrival in the country, Zhabdrung Rinpoche formulated the Code of Law based firmly on Buddhist principles and addressed the violation of both temporal and spiritual laws. These laws contain a specific reference to the ten pious acts, known as *Lhachoe Gyewa Chu*, and the sixteen virtuous acts of social piety, referred to as the *Michoe Tsangma Chudrug*. They also refer to precedents, such as the laws formulated by King Mangkur and Melong Dhong, as well as King Songtsen Gempo's Ten Virtuous Acts.

The legal codes promulgated during the time of Zhabdrung incorporated the principle of separation of powers and accountability, fair practices in trade, obedience to laws, fair trial, due process in adjudication processes, and equality before laws. Zhabdrung's code of law was carried forward and spread by the *Desis* who ruled the country after him.

Law made during the Wangchuck Dynasty.

The law under the succession of the monarchs is unwavering and like an ultimate end of the sea. It was *Desi* Jigme Namgyel, then serving as Trongsa Poenlop, and the succession of Monarchs who were the first ones to enact various laws. I want to acknowledge the Centre for Bhutan Studies' excellent biography on Desi Jigme Namgyal's biography, from which this brief account has been derived.

These laws echo down to the modern day. The laws formulated by *Gongsar* Ugyen Wangchuck–the eventual first King of Bhutan–is reflected in the curriculum of JSW School of Law. And recent research conducted by the Judiciary indicates that the widely-used maxim, "King loves his people, his people desire happiness; the source of people's happiness is rule of law." is an abstract from the law promulgated by the second King, His Majesty Jigme Wangchuck.

The emergence of the *Thrimzhung Chenmo*

Most of the people present are aware that Chapter 17 of the *Thrimzhung Chenmo* (supreme law), which reflects on *Doedhen* Kuensel Melong remains as Third King's legacy. Furthermore, the third King empowered the people, enabling them to participate in the adoption of laws and to offer their views and recommendations. In fact, first-ever National Assembly session, which was held in Punakha Dzong during 1950-53, revised the *Thrimzhung Chenmo* three times.

During the 12th National Assembly (1969), the 36 people's representatives deliberated onthe legislation regarding land, marriage, inheritance, and lending. Upon the ratification by His Majesty the Third King, this popularly-adopted law was recognised as the supreme law of the land.

Conclusion

I am hopeful that the people of Bhutan embrace the promise of research-based learning through this conference. Furthermore, I expect that the students who enrol in Jigme Singye Wangchuck School of Law are enriched with the comprehensive conception of the principles of Gross National Happiness and the Law and equip themselves with the research skills in the field of law.

Legal Transplants: Modernization or Dilution?

Dasho Lungten Dubgyur[1]

Kuzuzangpo to everyone la!

I have been assigned the topic "Legal Transplants: Modernization or Dilution?" Well, the assigned topic did enthuse some exchanges of thoughts among the Justices of the High Court during the lunch break. In this presentation, I tried to analyse whether there were legal transplants in the process of modernization and hence dilution or not while drafting our laws in Bhutan.

The assigned topic must necessarily focus on legislative reforms in Bhutan in the past several decades. In my presentation, I would like to justify, or rather challenge, the audience with questions as to whether we have really "transplanted" or whether we have rather diluted, modernized, or even strengthened our legal system through these legislations.

Since the establishment of National Assembly in 1953 by His Late Majesty the Third *Druk Gyalpo*, our laws to date technically total 143. However, to be precise there are 98 laws in force as of today. There are a few laws which are literally redundant or for which there are no findable copies. This is how bad we are in keeping our records.

I would like to begin by discussing the adoption of the *Thrimzhung Chenmo*. As a side point: the actual year of enactment of *Thrimzhung Chhenmo* is often contested. The original publication of *Thrimzhung Chhenmo* references no date or year, and most official documents and scholars date it to be 1959. However, my own research indicates that the *Thrimzhung Chhenmo* was in force since 1957; in particular, the preamble to the Loan Act of 1980 draws its authority from, and purports to amend, Chapter *Nga* (four) of "the Thrimzhung Chhenmo of 1957."

[1] Judge, High Court, Royal Court of Justice

I will then explore the legislation and the legislative drafting process during four periods: the early and mid-1980s; the mid-1990s to early 2000; 2000 to 2008; and the post-Constitutional period, 2008 to the present. I will be looking, during each period, at whether our laws are legal transplants, and whether they have been at all modernized or diluted in the process.

I would like to argue that the *Thrimzhung Chhenmo* and the laws of the 1970s and 1980s were actually drafted *by Bhutanese* and therefore very Bhutan oriented: they reflected local customs, prevailing norms, and traditions.

In 1977, His Majesty the Fourth Druk Gyalpo constituted a five-member Legislative Committee to draft laws related to land, marriage, inheritance, loans, and so on. The Committee consisted of members from the High Court, Royal Advisory Council, clergy, and National Assembly, as well as a Chairman and Secretary. Within a few years, the Committee drafted eleven Acts, thereby transforming the several chapters of the predecessor *Thrimzhung Chhenmo* into separate Acts. The laws drafted by the Committee were consistent in terms of language, reflected our cultural perseverance, and avoided duplication of sections or provisions across different laws. They also maintained consistency in the usage of words with classical *Chokey* (རྫོང་སྐད་) mixed with Dzongkha language.

An interesting side note: today we argue about gender-neutral terms in our laws: one of our canons of construction is that "he" shall mean, or should include, "she." Opponents reply, "Oh no, no! We have to have he or she (ཁོ/མོ)." But interestingly, in those laws from the 1970s and 1980s–some of which, like the Marriage Act are still in force–employ gender-neutral terms such as "*Choshu Yada*" (ཆོས་ཤུག་ཡ་རྒྱ), "*Tepo*" (གཏེ་པོ), *Denpai Dagpo* (བདེན་པའི་བདག་པོ), and *Zunpai Dagpo* (ཛུན་པའི་བདག་པོ), which over the years have lost these nuances by way of the so-called simplification of Dzongkha legal language.

The laws predating 1985 were all drafted in Dzongkha or mixed classical Chokey. These laws, including *Thrimzhung Chenmo*, were later translated into English only in mid 1990s. However, everyone fought for simple Dzongkha in the

legal text. They said that laws should be understood by everyone, and I agreed. But in the process, and in the name of simplified legal Dzongkha, we have actually lost the nuance of the beautiful words that our forefathers coined.

One example of this is the loss of the introductory "benediction clause," called *Choepar Joepa* (མཆོད་པར་བརྗོད་པ) or *Noenjoed* (སྨོན་བརྗོད), which described the necessity of the law andhow one could obey it. Today, the English version of our laws consists of a perfunctory preamble, whereas the translated Dzongkha text might either include a benediction clause or simply a translated version of the English preamble only. Those earlier laws also included concluding *Thukmoen* (ཐུགས་སྨོན) and *Moenlam* (སྨོན་ལམ) clauses, usually two to three pages with profound words.

After the mid-1980s, we experienced a major paradigm shift in the methodology of law-making. Laws were needed to be drafted in response to those rapid socio-economic developments that took place in our country. Further every Ministry and Government Department with donor-assisted projects required sound policies backed by legal authority. Moreover, each Ministry and Department wanted to project that whatever they do, or their actions taken were lawful and confined within the ambit of the Rule of Law. Such developments, though positive, resulted in a torrent of law-making–importantly, largely driven by foreign legal consultants.

In this regard, His Majesty the Fourth Druk Gyalpo shared his concern in the following words:

> *"Bhutan must have laws that serve the people…New laws were enacted every year. Some of these laws missed the nuances of the Bhutanese context because they were copied from other countries."*

Bhutan thus began to engage foreign lawyers who were assigned to draft legislation, revise policies, or give legal advice. Even with the best of intentions, they inevitably brought with them their own experience and legal background, which influenced Bhutanese law. The first generation of *Bhutanese* lawyers emerged only in the late 1990s, and therefore, during these early years, there was a lack of local counterparts who could have engaged the foreign consultants on their own level. It is not surprising, therefore, that our laws (and our legal system) became increasingly complex, with diverse legal paradigms–including numerous conflicts between civil- and common-law approaches–infused into our laws.

As one example, under the Moveable and Immovable Property Act of 1999, there is a provision in section 22 which mentions that, under certain circumstances, "*the principles of Bhutanese Customary and Common law*" would apply. This is clearly a legal transplant: to that point, Bhutan has never followed a "common law" tradition.

While these changes were occurring, English overtook Dzongkha as the legislative language of preference. For this, some of us here share the blame: we all find ourselves comfortable writing laws in English and then translating them into Dzongkha. However, each and every Act has a section that gives interpretive preference to Dzongkha: Should there be conflict between the English and Dzongkha versions, the Dzongkha text prevails. The exception here, of course, is the Constitution: both the English and Dzongkha versions of the Constitution have equal interpretive authority. In this regard, it was that the Dzongkha text was not generally comprehended; since the Constitution is the Supreme Law, both languages were given equal status to promote maximum comprehension.

Around the time the first draft of the Constitution was released, there was a general movement that Dzongkha had to be simplified. It was argued that the Constitution needed to be understood by everyone. This meant, however, that we could not employ most of the standard and precise Dzongkha legal terminology. Let me be very critical here: doctors need to study medicine and their medical

terminology is not understood except by other medical professionals. Similarly, lawyers need to study laws for years, and certain legal language or legal terms can be understood only if one has undergone such study. Obviously, there are certain specific legal terms or language that only professionals can understand. But in the end, we had to concede and employ generic terms in our Constitutional provisions.

During the period 2000-2008, the Judiciary took the lead in drafting certain critical laws, both procedural and substantive. As a consequence, the Judiciary has developed new legal terminology and published a new Dzongkha legal dictionary. Through years of research, this has helped to internalize Bhutanese legal terms, either re-discovering or either coining legal terminological analogues to English legal terms and improving co-equivalent Dzongkha terms with that of English.

His Majesty the King said:

> "*It was in 1967, that His Majesty the Third Druk Gyalpo Jigme Dorji Wangchuck has established an independent judiciary therefore my father the Fourth Druk Gyalpo Jigme Singye Wangchuck, while persistently working towards further strengthening and building strong legal system several laws and legal reforms and amendments were effected as per the needs of the society based on the age-old profound values that benefited our citizens."*

So in the end, we are looking to the laws that benefit modern Bhutan and our people. Over the years we strengthened not only the legal system but also legal terminology of Dzongkha. Today, I think that we are very comfortable, and our people have started to use *Thrim ghi Dhuensa* (ཁྲིམས་ཀྱི་འདུན་ས) which was changed from *Thrimkhang* (ཁྲིམས་ཁང་), and from *Zhutsig* (ཞུ་རྩིག) to *Sheryig* (བཤེར་ཡིག).

There are around eleven drafts of the Constitution, each circulated after each Constitutional Committee meetings, to the members of the Drafting Committee. This process culminated in one of the shortest Constitutions in the world. We are proud of our Constitution, which contains many unique features reflecting our own culture, tradition, and Bhutanese values intertwined with modern constitutional values. It strengthens the ethos of legal writing and strengthens Dzongkha legal terminology. (I have preserved most of the record so that it will be an invaluable source of research for our future generations.)

In conclusion, let us summarize whether through modernization, our laws got diluted by way of legal transplantation. For this, we look at the enlightened laws of our justice system, and that is consistent with the vision of His Majesty our King. The end goal of law is to achieve human happiness and a peaceful society through justice and enlightened laws for enlightened beings.

By way of conclusion, I have divided the evolution of Bhutanese Laws, like Maslow's hierarchy of needs theory, into three tiers of needs. One is from the eighth century until 1960, during which there was hardly any written laws except the 1652 code of *Zhabdrung* for which it was applicable for the laity with moral and ethical values for the *Sangha* as enshrined under *Vinaya* or the rules governing monks. Social conduct was based on unwritten laws and heavily depended upon certain Buddhist precepts. The second phase (1977-2008) coincided with rapid socio-economic development and, hence, the need for more regulations and the making of many new laws. This period culminated with hybrid of legislation and laws with bilingual, and the emergence of Dzongkha legal terminology to suit to a modern era. Finally, we have a legal system which is neither purely continental nor common law. Being an independent state for centuries, we are proud that Bhutan has never felt the mandatory influence of either the common law or civil law legal system. Our legal system today has mixed legal systems which are reflected not only in criminal and civil procedure but also in our substantive laws and in the Constitution itself. Tashi Delek

Bhutan's Constitution: Comparative Perspective

Nima Dorji[1]

Introduction

Many scholars, researchers and philosophers claim that the purpose of a constitution and a government is to promote the happiness of the people living under it.[2] This paper is a textual survey of the usage of expression "happiness" in the constitutions of different countries and compare it with the Bhutanese Constitution. For this paper, note that only word "happiness" is surveyed and not words which may have functional equivalence such as "well-being." However, at the end of the paper, I propose that the meaning of "happiness" in the Bhutanese Constitution differs from that of the other constitutional contexts, therefore, due to this difference in its meaning, the value accorded to "happiness" by different constitutions is different as well.

Including the Constitution of Bhutan, around 25 of 192 national constitutions surveyed use the term "happiness." Most of these are within the expression "pursuit of happiness." This phrase is said to have first been used in a quasi-constitutional context in 1776–first in the Virginia Declaration of Rights and, shortly after that, in the United States's Declaration of Independence.[3] These two documents recognise the "pursuit of happiness" as an inalienable individual right.[4] However, the 1787 U.S. Constitution replaced "pursuit of happiness" with

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[2] *See*, *e.g.*, Adam Smith, *The Theory of Moral Sentiments* (MetaLibri, 2006) 166; Ryan Rynbrandt, "The Pursuit of Happiness*"* Paper Prepared for the Western Political Science Association 2016 Annual Conference in San Diego, CA, March 25, 2016, 2.

[3] Laís Kondo Claus and Luciana Romano Morilas, "The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence" (2018) 2:1 *PHRG Peace Human Rights Governance* 121-124; Joseph R. Grodin, "Rediscovering the State Constitutional Right to Happiness and Safety" (1997) 25:1 *Hastings Const. L.Q.* 5.

[4] Art. 1, *The Virginia Declaration of Rights* 1776; Paragraph 2, *The Declaration of Independence of the United States of America*, 1776.

"property."[5] Nonetheless, around 30 U.S. *state* constitutions still declare that a person has a right to pursue "happiness" or to obtain "happiness and safety."[6] Due to its exclusion in federal constitution, most scholars and lawyers have ignored these provisions of the state constitutions, regarding them as mere literary echoes of the Declaration of Independence.

Theories of the Constitutional Value of Happiness

There are at least four ways in which different scholars interpret the concept of happiness in the constitutional context (which we may refer to as "theories of the constitutional value of happiness"). The first theory posits that happiness is a synonym for "property," and therefore, the right to pursuit of happiness is nothing but the right to property.[7] This theory uses John Locke's trilogy of "life, liberty and estate" to justify its argument–that is, these principles influenced the use of happiness in the Declaration and state constitutions; therefore, happiness is a synonym of property.[8]

The second theory claims that the use of "happiness" is a mere rhetorical flourish. It takes the view that the phrase "pursuit of happiness" is used merely to beautify the text of the Declaration and has no meaning attached to it.[9]

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[5] The Fifth Amendment, *The Constitution of the United States of America*.
[6] Joseph R. Grodin, "Rediscovering the State Constitutional Right to Happiness and Safety" (1997) 25:1 *Hastings Const. L.Q.* 1-7.
[7] Carli N. Conklin, "The Origins of the Pursuit of Happiness" (2015) 7 *Wash. U. Jur. Rev.* 198-200; Pauline Maier, "American Scripture: Making of the Declaration of Independence 105-23 (1997), quoted in Patrick J. Charles, "Restoring 'Life, Liberty, and the Pursuit of Happiness' in Our Constitutional Jurisprudence: An Exercise in Legal History" (2011) 20 *Wm. & Mary Bill Rts. J.* 476.
[8] John Locke, the *Second Treatise of Government*, First Paragraph of Chapter VII – Of Political and Society and first paragraph of Chapter IX – Of the Ends of Political Society and Government.
[9] Jibong Lim, "Pursuit of Happiness Clause in the Korean Constitution" (2001) 1:2 *Journal of Korean Law* 94; Carli N. Conklin, "The Origins of the Pursuit of Happiness" (2015) 7 *Wash. U. Jur. Rev.* 200-201.

The third theory equates "happiness" with "individual liberty," and argues that freedom from government interference is the unalienable and natural right of an individual. It is based on the principle of the "presumption of liberty,"–in a free state, an individual has a right against interference by the state.[10] Therefore, anything that inhibits liberty must be limited.

The fourth theory proposes that happiness is the "presumption of common good," as opposed to the "presumption of liberty." Proponents contend that the constitution is a part of the social compact between the governed and the government to ensure the happiness of the greatest number in the eudemonic (virtuous character or flourishing) sense.[11] According to this theory, the preservation of "life, liberty, and the pursuit of happiness" is a well-established political, constitutional, and legal idea that the government is created for the public or common good. It claims that the U.S. founding fathers used "happiness" in the sense that people would not succumb to electoral corruption and would, therefore, elect to govern them people with virtuous character or, at the very least, who would work to promote common good or happiness of the greater number.[12]

Happiness as an Individual Right

The constitutions of many countries recognize an individual right to the "pursuit of happiness." In Africa, the Namibian Constitution and Seychelles Constitution acknowledge the right to pursue happiness from all types of discrimination.[13] U.S.

[10] Patrick J. Charles, "Restoring 'Life, Liberty, and the Pursuit of Happiness' in Our Constitutional Jurisprudence: An Exercise in Legal History" (2011) 20 *Wm. & Mary Bill Rts. J.* 481.
[11] Patrick J. Charles, "Restoring "Life, Liberty, and the Pursuit of Happiness" in Our Constitutional Jurisprudence: An Exercise in Legal History" (2011) 20 *Wm. & Mary Bill Rts. J.* 498; Carli N. Conklin, 195.
[12] Patrick J. Charles, 526.
[13] Preamble, The *Constitution of Namibia* 1990; Preamble, The *Constitution of Seychelles* 1993 respectively.

state constitutions, as well as the constitutions of Belize,[14] Guyana,[15] Japan[16] and South Korea,[17] recognise the "pursuit of happiness" as an individual right. Although there is no mention of happiness in the constitution of Brazil, the Brazilian constitutional court has ruled that an individual has a right to the pursuit of happiness.[18]

What about Bhutan? From a plain reading of the Constitution, Bhutan's Constitution doesn't explicitly recognise "pursuit of happiness" as an unalienable natural right of an individual, either rhetorically or substantively. Article 7, which enumerates fundamental rights, does not include a right to happiness. Article 9, which enumerates State policies, doesn't use the expression "pursuit of happiness," instead mentioning "pursuit of Gross National Happiness."[19] This reflects an intentional diversion from the constitutions of other countries. While it doesn't downplay individual happiness, the expression used seem to suggest that individual pursuit of happiness without seeing the individual as part of the larger community is not practicable.

Happiness as Duty of the State

Several constitutions frame happiness as an obligation of the State or the State organs, rather than as a right vested in individuals. For example, the Constitution of Turkey provides that one of the fundamental duties of the State is to ensure the happiness of the individual and society.[20] In France, the 1789 Declaration of the

[14] Preamble (e), The *Constitution of Belize* 2017.
[15] Art.40(1), The *Constitution of the Co-operative Republic of Guyana* 1980.
[16] Article 13, The *Constitution of Japan* 1946.
[17] Art. 10, The *Constitution of the Republic of South Korea* 1948.
[18] Claus, L.K., Morilas, L.R. (2018), "The Right to the Pursuit of Happiness and the Right to Access Medical Treatment: Recent Developments in Brazilian Jurisprudence (2018) 2:1 *Peace Human Rights Governance* 125; Saul Tourinho Leal, "Right to happiness: a new constitutional approach" blogpost published on October 8, 2015 at https://belconlawblog.com/2015/10/08/right-to-happiness-a-new-constitutional-approach/#_ftn8, Visited on October 30, 2018.
[19] Art. 9(2), The *Constitution of the Kingdom of Bhutan* 2008.
[20] Art.5, *The Constitution of the Republic of Turkey* 1982.

Rights of Man and of the Citizen provides that acts of legislative and executive power must be used to maintain the general happiness.[21] The constitutions of Ghana, Nigeria, and Swaziland impose a duty on the State to ensure that the national economy is managed in a manner to maximise the welfare, freedom, and happiness of every person.[22] The Niger Constitution requires the President of Republic and president of National Assembly to work tirelessly for the happiness of the people.[23] The Thai Constitution requires government institutions to perform duties in accordance with the Constitution, laws and the rule of law for the common good of the nation and the happiness of the public at large.[24] The Vietnamese Constitution mandates the State to ensure that all people enjoy an abundant, free, and happy life and are given conditions for all-sided development.[25] It also mandates the State and society to provide a favourable environment for the construction of family which is well off, progressive and happy.[26]

Does the Constitution of Bhutan impose "positive duty" to the State to ensure happiness? Article 9(2) provides that "the state shall strive to promote those conditions that will enable the pursuit of Gross National Happiness."[27] Article 21(1) provides that "the government shall…ensure peace, security, well-being and happiness of the people."[28] Therefore, these provisions impose the duty on the State and the Executive government to "strive" to promote conditions to allow pursuit of GNH and ensure the happiness of the people respectively.

Happiness as a Constitutional Value

[21] Preamble, *France Declaration on the Rights of Man and Citizen* 1789.
[22] Art. 36(1), The *Constitution of Ghana* 1992; Art. 16(1), The *Constitution of Nigeria* 1999; and Preamble and Art. 59(1), The *Constitution of Swaziland* 2005 respectively.
[23] Art. 50 and 89, *Constitution of Niger* 2010 (as amended in 2017).
[24] Section 3 and 114, The *Constitution of the Kingdom of Thailand* B.E. 2560.
[25] Art. 3, The *Constitution of the Republic of Vietnam* 2013.
[26] Art. 60(3), The *Constitution of the Republic of Vietnam* 2013.
[27] The *Constitution of the Kingdom of Bhutan* 2008.
[28] The *Constitution of the Kingdom of Bhutan* 2008.

The Austrian Constitution provides that education should be geared to enable student become happy humans capable of taking responsibility for themselves, fellow human beings, the environment, and future generations based on social, religious, and moral values.[29] The Constitution of Antigua and Barbuda asserts that people's happiness and prosperity can be best pursued in a democratic society.[30] The constitutions of Nicaragua and South Korea both recognise the intergenerational happiness of the people.[31] The draft Constitution of Solomon Islands recognises happiness as principles to be upheld and practised within the communities.[32] The Constitution of Tuvalu recognises moral, spiritual, personal and material welfare as intergenerational happiness.[33] Tuvaluan Constitution further requires the people to recognise and affirm that the stability of their society and the happiness depend on the maintenance of their values, culture, and traditions, including the vitality and the sense of identity of communities and attitudes of cooperation, self-help, and unity amongst those communities.[34] The Thai Constitution requires all sectors of society to co-exist peacefully for happiness.[35]

Is happiness a constitutional value in Bhutanese context? The concept of happiness is not new for Bhutan. In the 17th century, when the dual system of governance was established, the primary purpose of government was acknowledged as ensuring the happiness of all sentient beings; if it is not able to accomplish that, then it has no reason to exist.[36] Therefore, the foundational value of the dual system of governance itself is the happiness of the people. After 1907,

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[29] Art. 14(5a), *The Constitution of Austria* 1920.
[30] Preamble (c), *Constitution of Antigua and Barbuda* 1981.
[31] Preamble, The *Constitution of the Republic of Nicaragua* 1986/7; and Preamble, The *Constitution of the Republic of Korea* 1948 respectively.
[32] Art.17(d), The *Draft Constitution of Solomon Islands* 2013.
[33] Art. 3, The *Constitution of Tuvalu* 1986.
[34] *Ibid.*
[35] Section 164(4), The *Constitution of the Kingdom of Thailand* B.E. 2560.
[36] Ura & et al., *An Extensive Analysis of GNH Index* (The Centre for Bhutan Studies, 2010) 6; Michael S. Givel, "Gross National Happiness in Bhutan: Political Institutions and Implementation" (2015) 46:1 *Asian* Affairs 105.

the Kings have become an integral part of the governance system for promoting the happiness of the people. As the maxim goes, "The King cares for the people, people aspire for happiness, and source or foundation of happiness is the law." Out of the King's care for the people it gave birth to profound philosophy and policy of Gross National Happiness. Therefore, happiness in Bhutan is not mere rhetoric; instead, happiness is one of the fundamental values of the Bhutanese Constitution.

Happiness as Aspiration

The Constitution of Liberia gives power to the people to alter or reform the government when their safety and happiness so require.[37] The Constitution of Egypt refer to Egypt as "a place of happiness shared by all its people" – therefore, happiness in the Egyptian context is aspirational.[38] The Constitution of Guyana requires a person to dedicate her energies towards the happiness and prosperity of Guyana–therefore, it imposes a collective duty to all the people of Guyana.[39] The Constitution of Pakistan requires the people to make their full contribution towards the happiness of humanity.[40] The North Korean Constitution recognises economics as the foundation of happiness.[41]

The Second Schedule to Bhutan's Constitution recognises people's collective aspiration for "peace and happiness."[42] Its Preamble mentions "solemnly pledging ourselves…to enhance the happiness and well-being of the people for all time."[43] Therefore, happiness in the Bhutanese Constitution is both aspirational and a collective duty of the people to ensure intergenerational happiness.

Bhutan's Approach to Happiness in the Constitution

[37] Art.1, The *Constitution of Liberia* 1986.
[38] Preamble, The *Constitution of Egypt* 2014.
[39] The National Pledge, The *Constitution of the Co-operative Republic of Guyana* 1980.
[40] Preamble, The *Constitution of the Islamic Republic of Pakistan* 1973.
[41] Art. 26, The *Socialist Constitution of the Democratic People's Republic of Korea* 1972.
[42] The *Constitution of the Kingdom of Bhutan* 2008.
[43] The *Constitution of the Kingdom of Bhutan* 2008.

The common feature of most constitutions of other countries appears to proclaim freedom from tyrant leader, economic exploitation, and discrimination. This suggests that happiness is seen as either synonym of property or as a right to property, and as an individual right. However, the concept of happiness in Bhutan is founded on Buddhist principles. The Buddhist idea of happiness relates more to eudaimonia–engaging in righteous actions. According to Buddhism, selflessness–doing good to others, and living contented life–with adequate food and clothes at a due time brings happiness.[44] Interconnectedness or interdependence, seeing oneself in connection to all sentient beings is a means to happiness.[45] This is consistent with the teachings of Aristotle, who contemplated similar approaches to happiness–happiness as the chief good or end of life, that is, virtuous action.[46]

As our Honourable President, Princess Sonam Dechan Wangchuck, mentioned in her keynote address, the Constitution of Bhutan is founded on the pillars of Gross National Happiness.[47] His Majesty the King has further suggested that GNH reflects Bhutanese way of life; in this sense, so does the Constitution, which is based on the Bhutanese values with some innovation in the governance structure.[48] Otherwise, what we value hasn't change–the timeless bond between the King and the people, solidarity and interconnectedness, respect for our culture and environment, the kind of leadership we aspire for, and the manner and disposition

[44] Phuntsok Tashi, "The Role of Buddhism in Achieving Gross National Happiness", in Karma Ura & Karma Gayleg ed., *Gross National Happiness and Development* (The Centre for Bhutan Studies, 2004).
[45] Matthieu Ricard, "A Buddhist View of Happiness" (2014) 29:1Journal of Law and Religion 21; Matthieu Richard, "A Buddhist View of Happiness" in Susan A. David et al., eds., *The Oxford Handbook of Happiness* (Oxford University Press, 2013) 344.
[46] Aristotle, *Nicomachean Ethics*, W. D. Ross's translation (Batoche Books Kitchener, 1999) 3-5.
[47] Keynote Address by Princess Sonam Dechan Wangchuck at the opening of the GNH and the Law Conference (Thimphu, 17 July 2018).
[48] His Majesty the King Jigme Khesar Namgyel Wangchuck, "Foreword" in Susan A. David et al., eds., *The Oxford Handbook of Happiness* (Oxford University Press, 2013) vii.

as a member of society we are required to present, all form and inform our constitutional values.

Therefore, the happiness approach in Bhutan's constitution resembles those constitutions that have no reference at all to happiness. Bolivia and Ecuador adopt *Buen Vivir* as their constitutional principles, and South Africa adopts *Ubuntu* in a similar fashion. These principles are proposed as the transformative constitutionalism–an alternative to western constitutionalism. *Buen Vivir* is loosely translated as a good way of living–in other words, a way of doing things that is community-centric, ecologically-balanced, and culturally-sensitive.[49] It relates to the wellbeing but not in an individualistic sense–but the individual in the social context of their community and in a unique environmental situation.[50] South African Courts have interpreted *Ubuntu* as one of the fundamental principles of their constitution.[51] *Ubuntu* means that a person is a person through other persons–that we affirm our humanity when we acknowledge that of others–interconnectedness based on community solidarity is at the core.[52] Like the happiness concept in Bhutanese context–*Buen Vivir* and *Ubuntu* are also based on principles of interdependence and solidarity.

Conclusion

Not surprisingly, Bhutan's constitutional approach to happiness displays both similarities and differences to other nations' constitutions. The interesting conclusion, though is that if those parts are considered as having been borrowed, this borrowing meets with Bhutanese way of life and the practice of Gross National Happiness. Such convergences further strengthen and validifies Bhutanese

[49] Eduardo Gudynas, "Buen Vivir: Today's tomorrow" (2011) 54(4) *Development* 441–447; Roger Merino, "An alternative to 'alternative development'?: Buen Vivir and human development in Andean countries" (2016) 44:3 *Oxford Development Studies* 271-286.
[50] *Ibid.*
[51] Silvia Bagni, "The constitutionalisation of indigenous culture as a new paradigm of the caring state" (2015) 1:3 *Int. J. Environmental Policy and Decision Making* 205.
[52] *Ibid.*

constitutional approach that would ensure constitutional stability. However, the expression, “happiness” used in Bhutanese Constitution indicates collective happiness (not as rights in the individualistic sense) based on the principles of interdependence, that imposes duty both on individual and the government.

Looking Ahead–Assessing Access to Justice in Bhutan – Opportunities and Challenges in the Coming Decade

Dasho Tashi Wangmo[1]

Distinguished panellists, ladies and gentlemen. My job as the last speaker of the day has become at once more difficult and easier. The difficulty is to keep you all awake, and doubly challenged is let alone be the minority in terms of the gender representation on the panel, and also, how do I maintain the intellectual curiosity running high. Also, I feel challenged again as I have been asked to assess "access to justice" in Bhutan: not only the current situation, but also the challenges that will face Bhutan in the next ten years. Who am I to assess what challenges will be there? Also it looks like I am the only one who does not come from a long legal background, so please excuse my terminology or ignorance.

I thought it is best to start off with setting the context, as we have heard much about GNH philosophy. But how do I contextualize into the specific topic that I will be talking about, which is access to justice?

The first question I will address is, "What kind of conducive environment do we have?" That is very much the basis of a related question, "What kind of a legal framework do we have in Bhutan that ensures or secures access to justice for Bhutanese?" I will then discuss the access to dispute resolution mechanisms, the core component of access to justice. And, finally, I will attempt to predict future challenges and opportunities.

We have constantly been inspired by our visionary leadership, His Majesty the King. Let me start my presentation with this quote: "With democracy, we aspire to build a Just and Harmonious Society, strengthen our beloved country, and fulfill all the aspirations of our people."[2] What more inspiration would we need to start

[1] Eminent Member, National Council of Bhutan.
[2] His Majesty the King, 108th National Day December 2015, Paro.

the day? In terms of context, I will not try to pretend to lecture on GNH. But I would like to explore it from the individual level.

What is justice? To me, immediately what comes to mind is fairness and the rule of law. The next question I asked myself is, "Why is access to justice important?" I did a little bit of a literature review, and in many of the documents it says that it is an essential or indispensable component or factor for promoting empowerment, securing access to equal human dignity, and more so in achieving social development.

The next question is, "When and for what do we seek justice, or access justice?" When disputes and grievances arise and when you go to a certain institution to seek justice because you are expecting a remedy in some form or another. All these things ultimately, to me, indirectly lead to happiness. You know, whether you get the solution or not, someone has heard and given a patient hearing to your grievances. That itself makes me feel happy, great. This is for me how I understand or contextualize at an individual level, justice and happiness.

Now bringing this a little bit higher to the national level, much has been said about Gross National Happiness, and *Dasho* Karma Ura was very involved in this process and in the conceptualization of the domains of happiness that we have. There are nine domains of happiness, and the next question is, "Where does justice or access to justice fall?" It falls under governance. It is very much encapsulated under the nine domains of Gross National Happiness.

Coming down to the legal framework, I would like to talk at two levels. One is constitutional provisions, and the other is specific laws. I picked up those that talk about justice. I would like to begin with Article 9 "Principles of State Policy." I think the previous speaker mentioned Article 9.2, "The State shall try to promote those conditions that enable the pursuit of Gross National Happiness." The reason I put this one is because this is the context that we are talking about, happiness, Gross National Happiness. Article 9.5 addresses specific topic of access to justice, stating, "State shall endeavour to provide justice to a fair, transparent,

expeditious process." Article 9.6 again talks about law and justice, stating, "The State shall endeavour to provide legal aid to secure justice."

We then turn to fundamental rights, Article 7.15: mentions, "All persons are equal before the law." That has to do with justice and access to it, and it precludes discrimination on the grounds of race, sex, language, community or other status. Article 7.16 talks about the presumption of innocence. Article 7.21 guarantees all persons the right to consult and be represented by a "Bhutanese Jabmi or counsel of his or her choice." That is provided to any individual who appears before court to be represented by legal counsel. Article 7.23 recognizes that all persons may "initiate appropriate proceedings at the Supreme Court or High Court."

We then turn to Article 8, fundamental duties. This is essential, because merely focusing on rights is not always okay; there must be fundamental duties in order to take care of the collective interest and that is why Gross National Happiness.

Now, Article 8.9 talks about a duty to "Uphold justice and to act against corruption." Article 8.10 mentions that, "Every person shall have the duty to act in aid of the law." That is saying that you cannot really do anything just because it is your "right." Article 8.11 imposes a duty to "Respect and abide by the provisions of this constitution." That is the duty of the individual.

Having said that, now how have we translated, or rather transposed, those broad constitutional provisions into specific laws? I just want to list down those laws that support or somehow actually further break down into details.

First and foremost, I will mention the Penal Code of Bhutan 2004, as amended in 2011. Everyone knows that, the codification of crimes and penalties are essential to protecting and securing justice for all people.

The second one is the Civil and Criminal Procedure Code of Bhutan 2001, which sets the standard procedures for handling the criminal and civil cases. The Prison Act of Bhutan–that was first adopted in 2009, but we've since had a major

overhaul–"ensures proper establishment and standard management, administration, control, and security of prisons including the welfare of prisoners and matters relating to the reformation and rehabilitation of prisoners." I think this is also justice and rights. The Evidence Act of Bhutan 2005 ensures that no arbitrary accusations or allegations are brought against a person; there must be evidence to be proven guilty before the court. The Jabmi Act–Jabmi is "legal counsel"–we amended that in 2016, a major amendment, that was intended to professionalize the bar.

The Judicial Service Act of Bhutan 2007, is another important component, as it ensures the Judiciary's independence and accountability. The Office of Attorney General Act 2015, replaced the prior Act, mainly to protect this office from undue outside influence when it represents the State. We have also passed laws intended to protect vulnerable groups: these include the Child Care and Protection Act 2011, the Child Adoption Act of Bhutan 2012, and the Domestic Violence Prevention Act 2013.

Now let us have a look at the mechanisms of dispute resolution. We have, first and foremost, judicial proceedings: people come to acourt of law to address and redress disputes. Today we have the Supreme Court, the High Court, twenty District Courts and fifteen sub-District Courts. In addition, people can go through arbitration, conciliation, and mediation. One active forum of arbitration is administered by the Ministry of Labour, where the functions are well charted and laid out in the Labour and Employment Act of Bhutan 2007. There is also the traditional or customary practice of mediation that is still being practiced in rural communities, and Bhutan National Legal Institute (BNLI) has played a very major role in building the capacity of these mediators. We also have the Alternative Dispute Resolution Centre, established by the Alternative Dispute Resolution Act 2013, which just opened its doors in the past few months.

I could have stopped at looking at what are the legal procedures and alternative dispute resolution options so arbitration cases can be done. But since

we aspire to be happy, we have to go well beyond these two mechanisms, in particular in terms of redressing administrative grievances.

Looking at the whole system, the major forum is, of course, the Civil Service. If any Civil Servant is unhappy with disciplinary action taken by the Disciplinary Committee of an agency, they have the right to appeal to the next approved authority. This is clearly stipulated in the Civil Service Act 2010. And again, we have established a process under the Cabinet Secretary that takes care of the grievances of the citizens when they are not happy with the public service system.

With respect to the rights of vulnerable groups like women and children, we have the National Commission for Women and Children which takes care of that, and then RENEW which is a Civil Society Organization (CSO). Providing a platform is one thing, but let us see if they are providing the services or not. Let us see from this data that is extracted from the annual Judiciary report, here you can see the number of cases admitted by the Judiciary; going by the consolidated number of cases by National Commission for Women and Children (NCWC) you see the total between 2012-2018 being 396 cases, likewise with RENEW you can see from 2008-2016 they have risen from 172 to 364 cases brought forward.

Prior to the establishment of the Alternative Dispute Resolution Centre (ADRC) arbitration cases were handled by the Construction Development Board (CDB) which arbitrated 123 construction related cases between the years of 2015 and 2018. The recently established ADRC has already registered 12 cases in its first few months of operation.

The Ministry of Labour and Human Resources in a span of three years has handled 511 cases. The Royal Civil Service Commission (RCSC) has so far received 25 appeal cases between 2014 and 2017. You can see when you break up these cases annually, that there is an increasing trend in all agencies. There are also the Prime Minister's Office's regular "Meet the People" sessions, during which anyone can come and speak on what they are not happy about. So far, they have

received 1,700 grievances. This means that so far, people are making use of these channels.

Legal aid is very important to access to justice. Our Constitution guarantees legal aid, and it is also provided for in our criminal procedure, the Child Care and Protection Act, the Domestic Violence Prevention Act, and the Jabmi Act. In fact, in the Jabmi (Amendment) Act 2016, we have mandated the bar council to provide *pro bono* legal aid. But the findings of the Judicial integrative standard says that lawyers take on pro bono legal cases but on a very limited scale, and there are by not even enough lawyers to take on merely paying cases. Some CSOs are providing pro bono legal advice and representation, this is the current situation.

What has the government done to provide legal aid? Guidelines have been developed in the National Council: in the last Parliamentary discussion, we had an intense debate and provided recommendations to the government and it has been looked into. There is a need for the establishment of a separate institution that can provide legal aid services.

Now having looked at all these things, let us get a proxy indicator of how we are faring in terms of providing access to justice. The GNH survey of 2015 indicates that 80% of the respondents reported that they enjoy all ten fundamental rights and freedoms; 81% say they enjoy the right to equal access and opportunity to join public service; 91% say they enjoy freedom to speech and opinion; and 82% say they enjoy freedom from discrimination based on political affiliation. By the look of it I think we are doing fairly well, but it is still only in the 80% area. We can do better.

As for my last topic, challenges in the next ten years, let me try to predict. I would like to see in the next ten years that we are catering to the needs of the growing urban population. Urban population is expanding rapidly, due to in-migration from rural areas. In 2005, 30.9% of the population residing in urban centres; according to the housing census in 2017, that number now stands at 37.8%.

There is an increasing trend in the number of cases reported by the Judiciary. Of these cases reported, and the majority of those cases registered are in urban or semi-urban centres like Thimphu, Paro, Wangduephodrang, and Phuentsholing. This will really require that the service provider institutions are adequately resourced. We will need to ensure that the courts are properly prepared for the challenge of how to handle the growing number of cases and growing population.

The second challenge is legal awareness among the general population. How many of us are aware of our rights? We must increase the knowledge about the rights and claims, as well as consequences of wrongful acts. We must not go about accessing rights blindly. If we look at the literacy rate as identified by the Population and Housing Census of Bhutan (PHCB) in 2017, shows that the general literacy rate has improved to 71.4%. If literacy is any indication of access and awareness, we definitely have a long way to go. And let down are the people who are uneducated; but even those who are educated, I think we have a very low awareness of legal provisions.

When I was doing homework for this presentation, I came to find was that there was very little to report about, and very little information on access to justice in Bhutan. There is no empirical study providing evidence to support policy and programme interventions on access to justice in Bhutan. That would be very useful if we are to make evidence-based decisions for interventions.

The opportunities I see are that no doubt there is a strong political will in Bhutan. The indication is found in the 12th Five Year Plan. Strengthening of Justice Services and Institutions, has been identified as one of the National Key Result Areas. Under that NKRA, the Judiciary, legal awareness, the Alternative Dispute Resolution Centre, and other services are all specifically mentioned; all of these are very important in order to enhance our access to justice.

New institutions, including JSW School of Law, the Bar Council, and the ADR Centre, directly contribute to enhancing access to justice for Bhutanese.

Again, I mention that it is also an opportunity for JSW School of Law, or anybody, to conduct a detailed study on access to justice addressing both the demand and supply sides. This will enable decision makers to make appropriate policies and programme interventions.

The final factor I would like to mention is our small population. Our small population has almost always worked to our advantage. Any small interventions that we make almost always bring immediate impact and immediate results, therefore I think in the next ten years and many years forward our small population will continue to be to our advantage.

I thank you very much.

Introduction: Celebrating Ten Years of the Constitution

Lyonpo Tshering Wangchuk[1]

HRH Ashi Sonam Dechan Wangchuck
Hon. Lyonpo Sonam Tobgye
Eminent Resource Persons, Students,
Distinguished Guests, Ladies and Gentlemen

It is a great pleasure and privilege to be a part of this Conference organized by JSW School of Law–especially on the topic ***"Celebrating 10 years of the Bhutanese Constitution"*** and to introduce ***Hon. Lyonpo Sonam Tobgye***–an extraordinary philosopher, guide and teacher to all of us in the Judiciary. I congratulate the Dean and management for initiating this first intellectual endeavour and express hope that there will be many more such conferences in the years to come.

Celebrating 10 years of the Bhutanese Constitution

The Constitution of Bhutan, adopted on 18th July, 2008 after exactly 100 years of benevolent Monarchy, is a product of peace and of Their Majesties munificence, vision, belief, and trust: that in the future, only the Bhutanese citizens can protect and safeguard the national objectives of sovereignty, security, peace and stability of the nation.

Constitutionalism in Bhutan is entrenched in our visionary and enlightened Monarch's conviction that the future of the nation cannot be placed in the hands of one person chosen by birth. Bhutan's progression from a Theocracy to Hereditary Monarchy, to the introduction of a system of participatory democracy–based on the pre-existing principle of universal adult franchise under a Democratic Constitutional Monarchy–has been deliberate and purposeful.

[1] Chief Justice of Bhutan.

Democratic changes in Bhutan germinated through internal evolution and not through external pressure, imposition, or slavish imitation. The spark of this extraordinary, landmark, and visionary reform was not popular demand or revolutionary pressures, but a carefully argued case articulated by the King. It is indeed a product of peace, a system best suited for the future well-being of the nation.

However, Constitutionalism in Bhutan remains an enigma: it was evolutionary and not revolutionary. This has prompted writers like Ghosh to state that democracy in Bhutan is not the reward of a revolution, but a gift from the Throne.

The Bhutanese Constitution as a device to enable people to act and constrain those who govern on their behalf, in turn to protect democracy and the rule of law, is operational, functioning, and entrenched. The institutions fashioned by the Constitution–Parliament, the Executive and the Judiciary, along with other independent Constitutional Agencies–have demonstrated that the national institutions are capable of upholding the values of the Constitution. I mean the core values of sovereignty and security; the supporting values of freedom and equality; and the structural values of democracy and rule of law. Consequently, the constitution ensures a government that guarantees that democracy and liberty are not empty promises.

The apprehensions of the people that the Constitution and democracy were coming too early for Bhutan, and that the interests of the people would be forgotten if the Monarchy were to devolve power to political parties have been proven wrong. Mainly because the Bhutanese Constitution is a result of the existence of the best energies of statesmanship, extensive debates, and careful crafting, and most importantly consultations with the people of Bhutan. Never before, in the history of any constitution-making process, was such widescale public consultation attempted or given due consideration as in the case of the Bhutanese Constitution.

Constitutional institutions and State actors in the early years grappled with many of the challenges that come with democracy–questions involving separation of powers, independence of constitutional authorities, powers and privileges of legislators, legislation and exercise of powers along with issues concerning the interpretation of the constitution. In a democratic system, conflict must be expected, and where there is conflict, it is a sign of the good health and functioning of the democratic system. However, whenever conflicts emerge, they are channelled by the Constitution and its provisions. Resolution of constitutional issues through adjudication and the advisory jurisdiction of the Supreme Court has amply demonstrated that the Constitution has truly become the supreme law (Article 1, Section 9) and a symbol of unity, similar to the person of His Majesty, the National Flag and the National Anthem.

The Bhutanese Constitution has endured without amendment for the last ten years Democracy has provided for change in the ruling party in the last general elections, without the entrenchment of the governing party elected in the first democratic process. It is a definitive indication that democracy is functioning and working for Bhutan, with the active participation of the Bhutanese people. The recent National Council elections have demonstrated a marked change and maturity in the manner the candidates conducted themselves during the campaign, the content of their manifestoes, and the response of the voters.

Judicial precedent is an independent source of law and is as important as custom and legislation. As practice and precedent continue to accumulate and harden into judicial carapace, opportunities for radical change, individual initiative, and innovation must diminish. Future generations of judges are unlikely to enjoy the freedom of action and choices that the current crop of judges have, except in times of great turmoil and upheaval. It is therefore incumbent on the present judges to set well informed, correct, and right precedent for posterity.

Hon. Lyonpo Sonam Tobgye

Ladies & Gentlemen, having served or being associated with Hon. Lyonpo Sonam Tobgye, most of us are aware, that during a career spanning 43 years in the service of the King, Country and the People (*Tsa-Wa-Sum*), Hon. Lyonpo has amply demonstrated his ability to shoulder important national responsibilities–whether it is the organizational development of the Royal Civil Service Commission and the Royal Audit Authority, the establishment and capacity building of the Judiciary, his exemplary stewardship of the Judiciary, or Hon. Lyonpo's commitment to building a unique brand of Bhutanese legal professionals, immersed in our laws and values, while also being conversant in international laws.

As a human being, Hon. Lyonpo–with his vast knowledge, experience, and respect for dignity of labour, persistence, and humble character–has always believed in sharing his knowledge with all. His strong grounding in spiritual values makes him a compassionate person and a caring parent, yet when required he has been firm and resolute.

Responsibility is invariably rewarded with trust. Therefore, when His Majesty decreed that it was time to change the system of governance, Lyonpo was chosen and entrusted with the responsibility to preside as the Chairman of the Constitution Drafting Committee, a role which he played with wisdom, good judgment, and elegance. No one was more suited and appropriate than Hon. Lyonpo, a man chosen by destiny, to lead the Constitution Drafting Committee. Having served as the Chairman of the Drafting Committee, under the benevolent guidance of Their Majesties the Kings, Lyonpo has intimate information and knowledge related to the principles and philosophies behind each provision incorporated in the Constitution of Bhutan. His insatiable thirst and appetite for knowledge and learning has made him the foremost authority on the Bhutanese legal system and comparative constitutional law. Hon. Lyonpo is probably the only legal figure in Bhutan today who has established himself as a respected constitutional expert, and he is a recipient of several awards both from within and outside the Kingdom.

Fali Nariman has said:

> "the state of the nation is invariably conditioned by the provisions and purposes laid down in the Constitution. The law of the Constitution is not only for those who govern, or for the intellectuals and scholarly, but for the bulk of the people, especially the common man, for whose benefit and safeguard--the document of governance has been written and enacted."

In this context, we owe a debt of gratitude to Hon. Lyonpo, for taking time and publishing the book, *Constitution of Bhutan: Principles and Philosophies*, which has provided the required information and guidance to enable the people to better understand the Constitution and democracy, helping them to play a constructive role in the destiny of the nation. It is said that that, inclusive democracy entails people's participation and not exclusion. Democracy is not a spectator sport: everybody is responsible and accountable in a democracy.

Conclusion

In conclusion, especially for our young students, I would like to quote an old proverb which states that "when you talk, you are only repeating what you already know. But if you listen, you may learn something new." Equally important is to also remember that "the master can teach you only the basics, the rest is up to you." Therefore, I am hopeful that you will make learning a lifelong endeavour: listen and engage actively, intelligently, and meaningfully in the question-and-answer session to make this Conference worthwhile and a grand success.

The working of the Constitution has had a lot of good, very little bad, and no ugliness. On this tenth anniversary of the adoption of the Constitution, it is indeed appropriate, and an opportune moment to offer our humble gratitude and

reverence for the leadership, vision, and guidance of our benevolent Monarchs, the esteemed members of the Drafting Committee, those involved in implementing the Constitution, and the people of Bhutan–for perpetuating a sovereign, progressive, and content nation.

Ladies and Gentlemen, having headed the Supreme Court, an institution designated as the guardian of the Constitution--as Chief Justice from 2010 to 2014, served as the Chairperson of the Constitution Drafting Committee; published a book on the Principles and Philosophies associated with the Bhutanese Constitution, there is no other individual better suited or appropriate to talk on this topic: "Celebrating 10 years of the Bhutanese Constitution."

Please welcome an incomparable and compassionate human being, philosopher, an elder statesman and doyen of Bhutanese Constitutional Law, Hon. Lyonpo Sonam Tobgye.

Tashi Delek

The Relevance of *Nyen-Ngag* in the Education of Bhutanese Lawyers

Khenpo Ngawang Sherub Lhendup[1]

Kuzuzangpo. The topic of my presentation today is one of the many fields of *Rigzhung* (traditional science) education. Among the many Rigzhungs--*Sumtag* (grammar), *Nyen-ngag* (poetry), *Ngag-doen* (orthography), *Choenju* (behaviors of the enlightened), *Tshema* (logic), and *Ngoenpa* (metaphysics), I have chosen to focus on poetry. The main reason is, poetry is one of the most important tools in relation to law: in fact, I argue that poetry is an important tool that is necessary for legal education in Bhutan.

All students who graduate from JSW Law will be able to utilize *chheth-tsoeth-tsom sum*, that is, the three arts of exposition, debate, and composition. Being legally educated means being able to exposit, to debate, and to compose. Poetry is one of the important and necessary skills in each of these three arts. Without poetry, we are not able to educate others, nor can we explain or convince those who are found to have committed offences. Further, if we have to draft legal documents, without poetry we will not be able to write. Poetry is an indispensable for these three arts in law.

I will describe how the importance of poetry is explained in four steps. Firstly, poetry is necessary for exposition, debate, and composition. Poetry serves as a necessary tool for exposition, debate, and composition in legal education. Poetry is important to refine the phrases to sound interesting and pleasant while composing. Poetic phrasing in the three arts functions like a box, where the poetic phrases and pleasant sounds are generated.

What do I mean? All precious gold, silver, and jewels are stored in a safe box to secure them. Similarly, poetry is where the three arts are stored. In addition, poetry teaches application of structural and symbolic conventions, which aids in creating awareness on any legal matters. Use of conventional symbol enables a

[1] Assistant Professor, JSW School of Law.

cognitive expression and engagement. In the context of these three arts, poetry is the most important which helps to connect them. Therefore, when the students graduate with law degree, a grounding in poetry will help them carry out their legal assignments better. Poetry serves as eye for a person to use exposition, debate and composition.

From summary of Buddha's teaching, it is said that,

> *"The assembly of hundreds of thousands of millions of blind people, if they cannot figure out the path or way how can they enter the town."*

How will a billion person lead by a blind leader, find their ways into town? Therefore, even if there are millions of blind persons, due to their disability of vision, they will not be able to find the way. As a result, they will not be able to reach their destination. Similarly, without poetry, a lawyer cannot achieve effective exposition, debate, and composition. Without poetry which serves like eyes to see, law will not be able to fulfil its purpose.

Therefore, poetry is considered the eyes of exposition, debate, and composition. Poetry refines the application of exposition, debate, and composition. It is important to have perfect words and meanings to explain to others, to debate with others, and even to compose. Hence, poetry is important for the composer to refine words and meanings together. Therefore, without the expertise in poetry, it is difficult to execute the three arts of exposition, debate and composition.

Further, without poetry, even when others see or hear or read, they will not appreciate. Loday Gelwa said,

> *"One may be young and smart king,*
> *Yet walks naked in the crowd,*
> *everyone will laugh,*

thus, composition without poetry, no learned would appreciate."

Even a young and handsome king, if he walks naked in public, will be laughed at, and no one will respect him; no matter how men and women will look handsome and beautiful, if they walk naked in the crowd, no one will respect or look at them. Similarly, no matter how expert one is in the three arts of exposition, debate, and composition, without poetry, one is not considered an expert. As the king of Janakongtsey Thruel said, "Without poetry, there is no purpose in conversation."

Secondly, poetry helps in explanation. To make others understand, it is vital to ensure that words are correctly sequenced, and sentences are properly structured, in both cases without errors. Poetry is essential in ensuring this aspect. This means, while performing our duties, whether in Parliament or in public, poetry is essential to ensure that, explanations are well sequenced and delivered with clarity.

If explanations are not well sequenced–if what is to be told at the beginning is told at the end or *vice versa*–it will be difficult to understand the issues and matters. Thus, if one knows and applies poetry, it will help to clearly explain, and one's explanation will look well sequenced and one's words will sound pleasant, soothing, and profound. Further, the explanation will be flawless and formidable. From *Kerab Paksam Thrishing*, it is said,

"From the three noble qualities
of the highly learned beings such as exposition,
debate and composition,
even if you are wise and expert, you are more like parrot."

As I said earlier, without poetry, you will not be able to explain clearly. It would be like parrot speaking, making it difficult to understand for others.

Now thirdly, the relevancy of poetry to debate. In order to balance in litigation, both methods and wisdom must prevail together, in order to determine whether the plaintiff or the defendant is right. Neither the method nor wisdom alone can determine the issue; hence method or strategy and wisdom must coexist to determine the issue. This is illustrated in the situation where the parties to a case may be overly aggressive or poor in argument. Methods and wisdom must be applied together depending on the nature of the parties.

As another example, poetry can be used as "method" by using soothing words so that one's adversary's mind is changed and a positive, conciliatory result is achieved. Since poetry contains soothing words and sentences, it can help to resolve the issues between the plaintiff and defendant.

Even in contentious matters, disputes can be resolved of course by logic and evidence. But to reach the conclusion and determine the result, poetry is used as a method (and logic as wisdom) to present and resolve issues in a more conducive manner.

Even to attain enlightenment, method and wisdom must be applied simultaneously, since compassion alone as strategy will not lead to enlightenment. In order to attain enlightenment, compassion as means of method must be accompanied by wisdom to reach the enlightenment. Similarly, for a general public, the rule of law also requires both method and wisdom to resolve the issues. It is said that "There cannot be wisdom without skill, and there cannot be skills without wisdom." These two are connected to each other. Therefore, we should not abandon either.

Now final and fourth topic is composition. Poetry is an essential part of composition. One of the main tasks of a lawyer is to draft rules and legislation where such laws do not exist; likewise, a lawyer must conduct legal research, draft orders and petitions, agreements, notifications, announcements, and record statements and draft judgments. Poetry is an essential skill in such tasks, as it refines the entire composition. Poetry will make the legal matters easy to

understand for the readers, both lay and expert, and the work will achieve its highest possible utility.

Tsendehn Gongma said,

"From three nobliest qualities of the highly learned beings
such as exposition, debate and composition,
there can be error in the first two.
jTherefore, the third one, composition is inevitable and must consider important."

In my opinion, composition is the most important among three arts. Therefore, to conclude on the above topics, poetry is important because the entire legal profession is dependent on the three skills of exposition, debate and composition and these three skills in turn depend upon poetry.

Is there Such a Thing as a Buddhist Legal Tradition?

Rebecca Redwood French[1]

Introduction

The title of this article, "Is there Such a Thing as a Buddhist Legal Tradition?", can be answered rather simply in the affirmative.[2] There most definitely are Buddhist legal traditions, a long and dense history of the use of the Buddha's words as law among thousands of monastic and lay communities as well as secular governments in Asia over the past 2,500 years. There have been monarchies in which special law codes were written based on the *Vinayas* such as the Buddhist Law Codes of King Rāmādhipati in what is now lower Myanmar; there have been monks serving as politicians, administrators, and heads of government such as the Dalai Lama of Tibet whose regent drafted a law code for the country; there have been temple complexes, which housed all of the major governmental functions for surrounding areas as in Japan.

In addition, there are thousands of monastic constitutions and charters, court decisions inside monasteries, Royal decrees by Kings outlining legislation for the monastic community, court cases in secular courts concerning Buddhist religious principles or the monastic community, and customary law based entirely on fundamental Buddhist religious principles and reasoning.

So, there is a great deal of evidence of a thriving, centuries-long, Buddhist Legal Tradition. However, there is also a great deal of evidence that scholars in the

[1] Professor of Law, University at Buffalo School of Law.

[2] I would like to thank all the members of this conference and of your new law school and the many distinguished guests that are here. I would like to particularly thank Stephan Sonnenberg for diligently asking me to come and to Karma Ura, and also *Lyonpo* Sonam Tobgye for pointing out in his talk yesterday that what is happening here in Bhutan is not happening at Harvard, Stanford, Yale, or Buffalo. I think that is correct, and the students at this law school have a very special opportunity to be able to learn in an environment in which the truly important questions are being asked about law.

West[3] do not think that this tradition exists. So, this changes our question: Why don't we discuss and study the Buddhist Legal Tradition in the West the way we study the legal traditions of every other major religious system? To put it another way, why is there no discipline of Buddhism and Law, in the way we study Christianity and Law, Judaism and Law, Islam and Law, Hinduism and Law, etc.?

This is a humbling question because it addresses a situation of absence, which is hard to figure out; it is a hole in the field of knowledge that has become normal, it is an omission presumed reasonable. This paper is meant to open up a line of questioning for scholars in law and Buddhist Studies to approach this omission, to start the process of figuring out this absence. First however, we have to set out a definition of religious law, then to demonstrate both what religious legal systems are studied in the West, and that my proposition about omission is true.

What is a religious law system from the Western point of view? Religious law concerns the ethical, moral, and behavioural codes that emanate from a religious tradition, that influence the cultures and societies that adhere to them. Most people in the West think that religion, religious law, and secular law are strongly related. It is common in the American legal academy to hear the statement that secular law is based on the religious principles of Christianity, or that law without religion loses its sanctity, morality, and inspiration. Buddhism and Buddhist Law would certainly fit into this definition of a religious law.

The religious legal systems studied in the West include the legal traditions of Islam, Christianity, Judaism, Hinduism, and Confucianism. Many hundreds of articles and books on these five religion and law areas are published every year. Centres in well-known universities, law schools, and divinity schools, each with professorial chairs and endowments, are engaged in the study of the laws of these religions. For example, at the State University of New York at Buffalo where I

[3] By the "West," I mean Europe and the Americas and all of their social, cultural, and economic history.

work, we have a Department of Jewish Thought that has eight professors, two of whom specialize in Jewish legal texts such as the Talmud, Torah and Misnah. Many private U.S. colleges were started by members of a particular Christian denomination, and there are law schools with Jesuit Catholic, Catholic, Protestant and evangelical affiliations. Three newer law schools cite their Christian perspective as fundamental to their teaching agenda—Ave Maria Law School, Regent University Law School, and Liberty University School of Law.

Is Buddhism and Law studied in Europe and the Americas? While most large universities do have a member of the faculty who studies the Buddhist religion, as recently as two decades ago, there was no serious study of the Buddhist Law Tradition as religious law in any university in the West. This is particularly surprising as Buddhism is the fifth largest religion in the world and perhaps the most influential religion in Asian history. It is traditionally stated that the Buddha spent his entire forty-five-year career elucidating both his religious ideas and the rules his disciples should follow, rules on how they should live their lives and comport themselves with others. We have these Buddhist Law rules written down in a few different versions in books called *Vinayas*.

The basic premise of this paper, then, is that we need to investigate why the absence, the lacuna, of Buddhist Law exists in the West and then apply this information to a consideration of the Buddhist Law Tradition here in Bhutan. To do this, we must look for significant points in history and specific persons who affected this outcome. Part One is an examination of some of the historical evidence. I will use the term, the "Christian Legal Imaginary" as a way to describe how people in European Christian countries came to define a religious legal system and what social and philosophical theories were developed to support that view. Both Comparative Law and Religion and Law, two large fields in legal studies today, did not explore the idea of Buddhist legal systems and we can look at why that might be. The colonization of Asia by the European states from approximately the 15th to the 20th century created another set of ideas about Buddhism, that

involved its inferiority and need for reform. European social theorists justified and bolstered these ideological developments. The story of the dismantling of the Burmese Buddhist legal system by English colonial officials is instructive here.

Part Two considers first, what the influence of Christianity was on the law in Christian countries and how it shows up in legislation, fundamental ideas and courtroom prejudices. Then it turns to what a system built on Buddhist values might look like. The Conclusion asks what might be done in a legally pluralistic country like Bhutan to take notice of its Buddhist Legal Tradition.

PART ONE

The Christian Legal Imaginary

What is the Christian Legal Imaginary?

We begin with the first possible reason that Europe and the Americas did not accept Buddhist law. For a thousand years between 800 and 1806 CE, the people of Christian Europe established a particular view of the relationships between politics, religion, and law. I am going to call this view the Christian Legal Imaginary.[4] An imaginary is a set of cultural and social ideas that a certain society has adopted; an imaginary has its own symbols, narratives, ideas, theories, rules, institutions, morals, phrases, and words. The Christian Legal Imaginary is basic to the legal institutions developed in the West and it is defined by European social and cultural history over a 1,000-year period. Anyone who studies in the West, who uses Western systems of law, religion, or thought, is using the Christian Religious Imaginary because it is the foundation for the principles and ideas that create Western law and religion. It exists culturally in most parts of European-influenced countries—Australia, New Zealand, Europe, England, Canada, the United States, Central America and parts of South America, and in all persons from

[4] See Charles Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004); Gérard Bouchard, *Social Myths and the Collective Imaginary*, (Toronto: University of Toronto Press, 2017)

other countries who get a law degree in one of those countries. It is also the basis for a secular law code, constitution, or regulations from a Western country. Examples of some of the ideas that are prevalent in the Christian Legal Imaginary*:* separation of church and state, due process before the law, public versus private law, retribution, legal rights and duties, individual person's ability to sue, natural law basis of the process, corporations as natural persons, etc.

The Christian Legal Imaginary began with the crowning of Charlemagne by Pope Leo III, and the beginning of the Holy Roman Empire of western Europe (800-1806). Contained in one geographical land mass (Europe) with one dominant religion (Christianity), the Holy Roman Empire was defined by several key ideas. One was "the Two Swords of Governance," which meant that the Pope and the King reinforced one another as they governed. Even though the occupants of these positions changed, the relationship between the two remained one of mutual support: the Pope crowned a King, the King used his army to defend the Pope and the Catholic religion. So, though there were many conflicts, this model of government included a secular leader aligned with a religious leader within a bounded geographical area. A second point is that there is one central text used by everyone in this area, the Christian New Testament and the Hebrew Bible, texts that provided the narratives and ritual quality of the religious experience. The Christian Religious Imaginary also included the concept of exclusivity of religion (having no other Gods but a Christian God). In 1150, the monk Gratian of Bologna began the process of reducing and aligning the principles in the *ius civilis,* the commercial and criminal law code of the former Roman Empire, into the document we now know as the Canonical Law of the Roman Catholic Church. In short, the legal basis of the Christian Religion and the Holy Roman Empire is rooted in the imperial law code of the Roman Empire and its commercial practices.

Even after the Reformation, with the advent of the Thirty Years War in 1618, there was always a King sending armies into the field in the name of God and a Christian leader (sometimes more than one) and, reciprocally, a Christian

leader giving legitimacy to a King. This relationship was delineated by a tight and necessary bond between government and religion, that was hierarchical, monotheistic, commercially-oriented, authoritative and enforced by a military.[5] There have been many changes due to the Enlightenment and colonial experiences in the Americas, but the basic foundations of this set of cultural ideas have not changed.

Does Buddhism fit this Christian Legal Imaginary?

Buddhism as a religion, does not fit into any of the above categories. For over two thousand years, Buddhism spread and dispersed over much of Asia. It did not incorporate a secular imperial law code, it did not have a singular religious text, it did not seek to connect itself to national, state or local governments that would protect it militarily from incursions. It is not a monotheistic religion with an omniscient and all-powerful God, nor is it generally hierarchical, nor exclusive of other religions in its orientation. For these reasons, it would be hard for a person trained in the Christian Legal Imaginary to have understood Buddhism as having a proper religious legal system.

Colonialism of Buddhist States in Asia

The European colonial takeover of regions in Asia is perhaps another reason for the lack of importance attached to the Buddhist Legal Tradition Between the 16th and the 20th centuries, European imperial powers took over the extraction of natural resources and industries for global markets, a process that began with the

[5] I present this *Imaginary* because it came to light whenever I have given a lecture on Buddhist or Tibetan law. The questions from the audience are always based on this *Christian Legal Imaginary*. Whenever I am at a conferences or giving a paper, at the end, scholars, lawyers, sociologists, and historians ask me questions that revealed what they thought law was: "Why didn't the Buddhists rise up and defend themselves when the colonists or Maoists came in?"; "I thought everyone was sort of equal in Buddhism and that never works for running a country!" "Do the Buddhist have Natural Law?"; "The Buddha didn't say anything, did he, about law or politics?"

Portuguese takeover of the Sultanate of Malacca on the Malaysian peninsula in the 16th century. Promoting Christian values and the Christian legal legacy was part of the colonial mission. When the British first entered Burma in 1820s, they eliminated the Buddhist monarchy, reduced patronage of the clergy, and removed the patriarch of the Buddhist religion. At the end of the Third Anglo-Burmese War, British law officers were assigned the task of eliminating the Burmese Buddhist Law Codes, the *Dhammathat* and *Rajathat*, and replacing them with a colonial law code. The British colonial government clearly recognized that Buddhism was the basis for Burmese law as well as the law of several other countries, such as Tibet, Sri Lanka, and Thailand. The British rule of Burma continued for approximately 130 years until 1948. Similarly, the ideas of the Christian Religious Imaginary and the superiority of the colonial government and culture were carried through all European colonial interactions in Asia from Goa in Western India to Ceylon to the northeast coast of China and Japan.

Supporting Theories about Superior Religions and Societies

During the colonial period, European and American intellectuals in the social sciences and philosophy developed theories to support the takeover of territory by European powers based on three concepts: the superiority of European society, the need to bring civilization to Asia, and the spread of Christianity. Lewis Henry Morgan, for example, a railroad lawyer in Rochester, New York, wrote a widely disseminated book in 1877 that touched on these themes, *Ancient Society, or Researches in the Lines of Human Progress from Savagery through Barbarism to Civilization.* Based on the steps in Morgan's ladder of civilizations, from savagery and barbarism at the bottom to European monarchies at the top, Friedrich Engels, Karl Marx, and other intellectuals developed graduated steps, a progression of societies with African and Asian societies at or near the bottom. The colonizers appropriated this ladder of social evolution to profess their superior governmental

institutions, religion, laws, commerce and other attributes to facilitate the replacement of the local institutions in Asia.

In addition to the notions of superiority, the necessity of resource extraction and social evolution, an important set of ideas linking commercial advancement to certain types of religions, societies and governments was also advanced. Max Weber was one of the most important scholars in Europe at the turn of the twentieth century. In *The Protestant Ethic and the Spirt of Capitalism* (1905), he conjectured that the Protestant religion was good for fostering a capitalist work ethic, that the religion and the system of economics had a resonance, an "elective affinity," due to Protestant virtues of self-control and discipline through inner-worldly asceticism. He also investigated the economic ethics of the religions of China, India and ancient Israel. In his book on the religions of India, *Hinduismus und Buddhismus* (1916), he found the opposite, that Buddhists were "other-worldly" and did not focus on hard work, active engagement, or material improvement. Weber's sociology of religion, his contrasts between asceticism and mysticism, inner-worldly and other-worldly, rational and irrational, are studied avidly today in every social science department in European-influenced countries and have become part of the Christian Religious Imaginary. Here again, this set of dichotomies compares Christian Europe as a good place for economic development, improvement and progress to a Buddhist Asia that is not. As a mystical and other-worldly religion, Buddhism is not conducive to legal, economic or political endeavours.

Comparative Law and Buddhism

Another field that created ideas about the relationship of law to religion, culture and politics at this time was the newly developing area of Comparative Law. Although some work had been done by Baron de Montesquieu as early as the 18th century, it was not until the middle of 19th century that comparisons of unified national law codes began to spring up in Europe. Professorial chairs in the field of

comparative law were established in universities in Paris (1831 at Collège de France; 1846 at the University of Paris) and London (1894 at the University of London) to begin the serious study of the differences and similarities between legal systems.

In the year 1900, the first ever International Congress of Comparative Law was convened in Paris with lectures given by legal scholars from all over Europe. A string of codifications of national legal rules had occurred on the continent following the drafting of the Napoleonic Code in 1804, and so, at the first Congress, several scholars entertained the exciting possibility of a global common law for all nations. Micro- and macro-comparisons of legal issues were part of the methodologies employed, as well as investigating the structural differences between systems such as a division into public and private law or the doctrine of equity.

Another large area of concern was classification of legal systems into "families of law" on the basis of economics, history, structural type, location, etc. Noted for his work in this area and his volume *The Major Legal Systems in the World Today* (1968), Renee David set out a classification of legal systems: the Romano-Germanic group based on Roman law, the Anglo-Saxon group using common law, Soviet law, then four religious law systems—Muslim law, Hindu law, Chinese law and Jewish law. Buddhist law is not included. Various other classification systems have been presented since by Konrad Zweigert and Hein Kötz, Rudolph Schlesinger and most recently Patrick Glenn of McGill University in his *Legal Traditions of the World: Sustainable Diversity* (2000) which received the Grand Prize of the International Academy of Comparative Law. Only by the fifth edition, published five years ago, did Glenn did mention Buddhism in a few paragraphs, stating that it "spread in a non-political; non-institutional way, just telling people about the ways of the world. And achieving some kind of consensus

only in Tibet … [because] societies were free to drift."[6] Note that this brief mention, in a 446-page volume that categorizes all of the legal traditions in the world, reiterates the problem facing Buddhist legal systems. Patrick Glenn is using the words of Max Weber from 100 years ago to describe Buddhist law as not legal or political.

Religion and Law and Buddhism

The discipline of Religion and Law is another area in which Buddhist Legal systems most certainly should have surfaced. Perhaps one of the most influential figures in this arena was Harold Berman, a famous comparative and international lawyer who taught for over sixty years at Harvard and then Emory Law School. In 1993, he wrote a book called *Faith and Order,* arguably one of the central texts in the discipline, in which he stated: "therefore, in the ancient civilizations of Asia, the intuitive, the mystical, the poetic side of life was emphasized, and the intellectual, the analytical, the historical, and hence the legal, was subordinated to it."[7] Now this Weberian theme has been picked up by almost all of the Religion and Law scholars in the West.

This tradition continues. This year, as member of the Association for American Law Schools Section on Religion and Law, I received a compilation of all of the articles, monographs and edited volumes written on the topic of religion and law by law professors in the United States for the year 2018. While it was not complete, this list contained approximately 378 pieces of writing in Religion and Law by 433 different authors, although a few authors wrote more than one piece during the year, this is more than one publication a day for the year of 2018. The list indicates a vigorous area of study.

[6] I was told that Buddhism was mentioned because he had read some on my work on Tibetan law.
[7] Harold Berman, FAITH AND ORDER, 1993

Many of the articles examined religious court cases on topics such as the famous wedding-vendor cases, but other topics included transgender policy, freedom of religion, the constitution, equality, prayer, copyright, local zoning decisions, women at work, the Quaker perspective, and religious speech as well as human rights, the questioning of government officials about their religion, religious pluralism, and sacred sites. Several legal systems were discussed, such as those of Northern Ireland, Canada, Nigeria, the indigenous Sámi people of Finland, Brazil, Indonesia, Cameroon, Vietnam, Pakistan, Iran, Bangladesh, India, Israel, and the European Court of Human Rights. The religions covered in these articles are primarily Christianity but there were several on Islam, Judaism, Native American religions, African religions, Kurdish religion, and even sorcery and zombie religious institutions!

The only article that even mentions Buddhism is by Sophie Goodman, "A Country Burning for Religious Freedom: The New Draft Law on Freedom of Religion in Vietnam,"[8] and it concerns the incorporation of American values on religious freedom into the Vietnamese Constitution. Buddhism is not even a central subject in the article. So, in short, as of 2018, the field of Religion and Law, as presented by one of its major organizations for law professors, does not include work on Buddhism and Law.

The above discussion on the absence of the Buddhist Legal Tradition is just an initial point of departure. There are many other possible rationales: (1) the definition of the term "dharma" as "law" very early on in Buddhist studies, and the use of the terms "monastic" and "discipline" to describe followers and the rules in the law code, (2) the priest-patron divide as a part of Buddhism, (3) the importance of God, monotheism and mutual exclusivity in the Christian Legal Imaginary, (4) the area studies approach in scholarship on East and Southeast Asia has resulted in the presumption of very strong divisions between various contexts of Buddhism

[8] Sophie Goodman, "A Country Burning for Religious Freedom: The New Draft Law on Freedom of Religion in Vietnam," 26 MICH. ST. INT'L L. REV. 159 (2018).

rather than similarities, and (5) the onset in the late 1970s of post-modernist theory that emphasizes differences, local cultures, non-essentialism and non-universalism. There are many other possible factors, all of which need further investigation.

PART TWO

Before we move to a consideration of what a Buddhist Legal Tradition is, let us first look for a moment at how religion affects law in Christian countries.

Christianity's Influence on Law

How does the Christian legal tradition influence law in the United States, for example? Several state and federal legislators have requested legislation to allow for Christian prayer in schools, crosses in public places and creches on the steps of government buildings at Christmas. The use of religious legal principles in the US appears in cases on abortion, LGBTQ rights, prayers in public settings, vouchers for religious schools, funding for religious advocacy in universities, teaching religious ideas of the origin of the world instead of scientific ones, and displays of Christian symbols to name a few. While these cases present different reasoning, the basis of these battles is often a religious idea such as the sanctity of the life of the unborn, the right to pray or the right to display religious symbols. Legal arguments in these cases often include citations to textual authority in the Bible or the New Testament.

Many law schools in the United States have courses on Christian Law. The preface to a law casebook entitled *Christian Legal Thought* (2017), published by Foundation Press, states that the goal of the book is to present the Christian point-of-view so that Christians can employ it in their legal decision-making to add God back into the law world.[9] The textbook uses articles and cases and also covers basic

[9] The Preface states that the goal of the textbook is "to illuminate law and legal institutions by seeing them in light of Christian accounts of God, the world and the

theological precepts such as the Creation, the Trinity, a perfect God,[10] the Nature of a Human Person, the Fall, Redemption and Resurrection. One section highlights the most influential theological Christian traditions from Roman Catholicism and Lutheranism to Calvinism and Evangelicalism. Chapter Four deals with Christian ideas on Human Equality, Justice and Normative Equality, the Providence of God, Natural Law and Divine Law, Natural Rights, and other issues.

The final section of the casebook talks about Christian values in the basic legal categories of contracts, criminal law, property, environmental law, and taxation. In an article in the section on taxation, the author uses "Judeo-Christian ethical principles addressing the relationships between human beings and their societal structures" and starts with the importance of "the creation account in the book of Genesis, in which God is the only supreme being and the sole creator of life." Interestingly, the author presents numerous Christian arguments for a tax structure to help the poor in Alabama using almost entirely Biblically based arguments.[11]

What is the Buddhist Legal Tradition?

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human person. … The point of emphasizing Christianity is not to deny the important relation of Christianity to Judaism or Islam, much less to denigrate those faiths or to deny a relationship between Christianity and "religion" generally. It is however to insist on the particularity of Christianity as against other faiths. Christians believe specific things, many of which they share with people of other faiths (e.g., a personal God who created the world and cares about it deeply) or of no faith (e.g., it is wrong to murder) and some of which they share with neither (e.g., Jesus of Nazareth is the second Person of the Trinity who will come again to judge the living and the dead.) CHRISTIAN LEGAL THOUGHT: MATERIAL AND CASES, by Patrick Brennan and William Brewbaker, III, St. Paul, MN: Foundation Press (2017), p. v.

[10] "… living and true God, who is infinite in being and perfection, a most pure spirit, invisible, without body, parts, or passions; immutable, immense, eternal, incomprehensible, almighty, most wise, most holy, most free, most absolute, etc." from the *Westminster Confession of Faith,* "an influential 17th century Protestant document" as cited in pages 105-6.

[11] Citing Susan Pace Hamill, "An Argument for Tax Reform Based on Judeo-Christian Ethics," 54 Alabama Law Review 1 (2002, cited in Christian Legal Thought, pages 605-620. The law review article ends with a long prayer to Jesus.

At this point, we have established that Buddhism and Law has not been included in legal scholarship in Europe or the Americas, and it is not compatible with the Christian Legal Imaginary, which makes it difficult for scholars with that background to consider other religious points-of-view.

And we also know that the Western definition of religious law fits Buddhist Law well because Buddhism has the five basic aspects of a religious legal system: the basic texts that contain the law; the systems of meanings, narratives and cosmology that undergird the religious system; the ethical, moral, philosophical and behavioural ideas that emanate from a religious tradition: the courts, rules, procedures and rituals that are used in religious and secular decision-making; and the social use of these ideas in everyday life. We also know that lay persons, scholars and the general public consider the religious influences on legal systems to be important and to be the source of the values that shape the legal system.

In Buddhism, the correct textual sources of religious law are clear: the *Vinayas*, the formal rules traditionally thought to have been expounded by the Buddha, or the *Vinaya* equivalent: that is, all of the various other sets of replacement rules that have been developed, in Japan for example. There are also numerous sutras and texts attributed to the Buddha in which he discusses government administration, the role of a just king, the purpose of following the rules, etc. The *Vinayas* present the Buddhist form of correct behaviour, rituals, organization, decision-making, and comportment within the religion. While some of the Buddhist rules may be considered different from the rules in the other major religions, they hold the same validity for Buddhist followers.

A second source of Buddhist Law is the system of meanings, narratives and cosmology that undergird the religious system that ultimately influence the legal systems of those cultures and societies in which the individuals live. In Christianity, this means the story of the life of Jesus Christ, the resurrection, sin, the creation of the world, the Trinity, a perfect God, the church hierarchy and

rituals, the nature of a human person, and the fall and redemption. In Buddhism, it would mean the Jataka tales and the life story of the Buddha, karma, samsara, nirvana, dependent origination, Buddhist holidays, compassion, meditation, impermanence, the illusory nature of the self, the Four Noble Truths, and the Eight-Fold Path as the basis of the law.

Current legal practitioners trained in a Christian-based system such as the United States would consider the intrusion of Buddhist ideas into a globalized, rational, modern legal system, as inappropriate. The answer to this objection is that the practitioner is not cognizant of the Christian-influenced principles undergirding every part of the present-day U.S. legal system. Those principles determine what evidence is admissible, who is understood to be a person, what procedures can be used, and what ideas can be put forward from a European Christian point-of-view. A good example demonstrating this is the history of Native American religion cases in the United States. In almost every instance in which a Native American religious argument was made, the Courts did not agree with the plaintiff or defendant because the religious argument is found not to have a substantial basis. A famous Native American law professor, Vine Deloria, once explained this problem in terms of "religions of place" (Native American) versus "religions of time" (Christianity and Judaism). He showed in his writings that U.S. courts were incapable of validating religions of place and therefore always over-ruled decisions validating sacred tribal grounds.[12] While it is natural that the legal systems of the West would be affected by Christianity, it is important to remember that it is a specific point-of-view and not an all tolerant, global, rational, and modern legal point of view.

A third source of Buddhist law is the ethical, moral, philosophical, or behavioural ideas derived from Buddhism. In a Christian-influenced courtroom, if someone makes an argument based on karma or the illusory nature of the self it is

[12] See Vine Deloria Jr., *God is Red: a Native View of Religion,* 30th Anniversary Edition (Golden, CO: Fulcrum Publishing, 2003)

usually rejected outright by the court. I know this because I am an expert witness for Tibetans and other Buddhists in courts and it is my experience that U.S. judges find it very difficult to accept these ideas. Any explanation that does not fit the allowed Christian standard model of religion is commonly rejected. So, I tend to testify about "cultural ideas" such as the renaming ceremonies for monks, the importance of the instructions of an abbot, how karmic ideas work, and the enormous religious importance of doing a mandala in sand that is then swept away and put in a river. In most of these cases, it is simply my elite credentials as a law professor in a Christian-based legal system that allows the Buddhist plaintiff or defendant to win. While the judge does not believe that my client has a valid religious belief, he is not willing to say that a law professor is wrong in her assessment.

Conclusion

So, the real question then, is not whether there are Buddhist Legal Traditions; there are and have been many Buddhist Legal traditions throughout Asia. We have also answered the question of why many people doubt the existence of a Buddhist Legal Tradition; it is because they have been trained in a legal tradition that is based on the Christian Legal Imaginary, which is very different from the Buddhist Legal Tradition.

Where does this leave us in terms of what can be done in a Buddhist country like Bhutan? How can the religious and legal ideas from Buddhism be integrated with a borrowed, global legal system from the Christian West? This issue of legal pluralism is actually the most important question for the Bhutanese Government and the Bhutanese bar.

All of the members of the Jigme Singye Wangchuck School of Law, from Her Royal Highness to the Dean, and from the faculty to the students who are just now enrolling and being trained, are squarely addressing this issue. Creating a new kind of law school, one that integrates the influences from the West and yet

preserves basic Bhutanese Buddhist ideas is the central mission of the school. I have a few thoughts about the process that you are undertaking.

First, please recognize and accept that all foreign legal systems, legislation and legal scholars, are working from the Christian Legal Imaginary and not Buddhist foundational principles. This is very, very important. It is not a bad thing to recognize this; foreign lawyers have many exceptional and useful skills to impart to Bhutanese. But it does mean that fundamental ideas in Western legal thought such as the degree of conflict that is permissible in advocating for your client, pushing as hard as you can to achieve an end, not giving valuable information to the other side, corporations as person, the importance of a final conclusion, and hundreds of other ideas are based on the Christian Legal Imaginary and may not be appropriate for Bhutanese Law.

Second, the idea of Gross National Happiness which has become fundamental to the political processes in Bhutan and generally accepted internationally, is of profound value to the Bhutanese legal tradition. It is a basic Buddhist principle enunciated by the former King but expressed as a common-sense idea for governance. While it is not an easy requirement, using the principles of Gross National Happiness bases the entire government on a foundational Buddhist idea. It requires thinking about the effect of a law on the nine aspects of social life before making a legislative change or a judicial decision.

Third, the Bhutanese Buddhist Legal Tradition is encoded in the thoughts and practice of the Bhutanese people. As a result, it is imperative to continue to collect as much as possible of the customary legal traditions of Bhutan, especially in the villages. The law school is already conducting fieldwork in this area, and I would recommend that this continue on a large-scale basis. These traditions are not only Bhutanese in terms of culture; they were and are profoundly based in Buddhist principles and legal knowledge. The ways of arguing, the rationales used, the procedures, the sanctions applied, the resolution of conflict, the subject matters that bring on a conflict and those that do not, the reasons given, the ideas behind

the processes, these are all vital to understanding of basic Bhutanese Buddhist legal processes.

Fourth, lawyers and judges in any society work first and foremost from their own cultural and religious presumptions. This means that each individual actor in the Bhutanese legal system should strive to work from a Buddhist cultural position even when using Western Christian-based legal processes. By this I mean that retaining one's Bhutanese Buddhist heritage and training is very important. The American judge in my example above was not able to understand the Tibetan Buddhist religion and culture even when it was explained to him in court by an expert witness. What this indicates is the profound importance of the basic religious ideas that each person working in a legal system already has inculcated in them. A study on this would also be an excellent idea.

Fifth, where and when it is deemed appropriate, Bhutanese courts can choose to allow in information in testimony and records that use basic textual sources from the Vinaya, the system of meanings, narratives and cosmology that undergird Bhutanese Buddhism, and the ethical, moral, philosophical or behavioural ideas derived from Buddhism. This will be a difficult balance but it means that local systems of thought and action will become available to judges, lawyers, plaintiffs and defendants in court. Also, as precedent develops, these ideas will be sorted out in the process of developing doctrine.

Thank you very much.

Buddhism and the Law

Khenpo Sonam Bumdhen[1]

According to the Buddhist theology, all the teachings that the Shakyamuni Buddha gave were said to be remedies for suffering and pain. And of course, the ultimate goal is to achieve happiness of all beings. According to the Bhutanese astrological calculations, three thousand years ago, Shakyamuni Buddha offered through his teachings eighty-four thousand ways of attaining happiness.

I would like to mention that we do not really have an exact translation of the English word "happiness" in Dzongkha or *Choekey*. Some approximate translations might be *gawa* (དགའ་བ) (joyful), *dewa* (བདེ་བ) (blissful), *kidpa* (སྐྱིད་པ) (peaceful), *trowa* (སྤྲོ་བ) (exciting), *tashipa* (བཀྲིས་པ) (auspiciousness) and *kelwa dang denpa* (བསྐལ་བ་དང་ལྡན་པ) (fortunate).

In the Buddhist teachings, there are two kinds of happiness explicitly mentioned, Happiness of Ngynthog མངོན་མོ་གི་བདེ་བ་ and མཐར་ཐུག་གི་བདེ་བ་ or higher rebirths within the six realms of cyclic existence which is the happiness of gods and humans, that is the *Ngynthog ghi Dewa*. Second is the *Ngyenleg* or "definite goodness," which is the happiness of liberation or emancipation and the ultimate enlightenment. It is my understanding that happiness can be viewed from a Buddhist perspective to various dualities or dichotomies. Some of the dualities include relative versus ultimate happiness, ཀུན་རྫོབ་ཀྱི་བདེ་བ་ དོན་དམ་ཀྱི་བདེ་བ་ subjective happiness versus objective happiness, individual happiness versus universal happiness, contaminated happiness versus uncontaminated happiness, worldly happiness versus transcendental happiness, temporary happiness versus permanent happiness, and so forth.

Now it is clearly stated in the Buddhist text that none of these forms of happiness can be achieved without the practise of *Tshultrim* (variously translated

[1] Chief of Research & Translation, Central Monastic Body

as “discipline,” “moral ethics,” or “code of conduct”). It is the moral discipline--the moral ethics that is solely the source of happiness. I quote Chandrakirti, the great Indian Buddhist Scholar, Palden Dawa Drakpa, རྒྱལ་སྲས་རྣམས་ཀྱི་ངེས་པར་ལེགས་པར་དང་་མངོན་སོའི་རྒྱུ་ནི་ཚུལ་ཁྲིམས་དེ་བཞིན་ནེད་ (“There is no cause other than moral discipline for the high status and definite goodness.”) In the same way, the great Buddhist master *Nagarjuna Goenpo Lhudrup* said, ཁྲིམས་ནི་རྒྱུ་དང་མི་རྒྱུ་ས་བཞིན་དུ་ཡོན་ཏན་ཀུན་གྱི་གཞི་རྟན་ལེགས་པར་གསུང་ (“Just as earth supports the ground, all the moving and unmoving, morality is the foundation of all the merits, worldly and transcendental.”)

Now let us look at the term *Tshuelthrim* (ཚུལ་ཁྲིམས་), which is the translation into Dzongkha or *Choekey* of the Sanskrit term “s*hila*.” *Shila* refers to a coolness which comes into a person’s veins--a reduction in the vexation of mind, which comes about by following our mode of conduct in line with the reality. In Tibetan, *Shila* was translated as *Tshuelthrim*–namely *Tshuel-* (the ways things are, the way a thing abides) and *thrim-* (a code of conduct or law). In other words, both Sanskrit and Tibetan speak of code of conduct that is in accord with the reality, the natural law.

In this context I would like to highlight the law of causality, the laws of cause and effect. According to Buddhist teaching, if one adopts positive deeds, one will experience positive consequences, and if one adopts negative deeds, one will experience negative consequences. That is what is meant by law of causality. This is also a connotation of pacification and easing of mind, when we talk about *tshuelthrim or shila*.

In Theravadan Buddhism the very essence of *shila* is to refrain from harming others through our body, speech, and mind both directly and indirectly and thus to attain ***Soso tha/soso Tharpa*/ (**individual emancipation).

In Mahayana Buddhism, the essence of *Shila* gets more advanced. In addition to not harming others, one tries to benefit others through the means of six perfections: generosity, discipline, patience, diligence, concentration, and wisdom.

In the Vajrayana Buddhism, the secret *mantrayana*, the essence of *shila*, is defined as strain in accord with the validity of the absolute truth. Both the former two essences, essences from the Theravadan perspective and the Mahayana perspective are spontaneously present through the practice of keeping what we called *Samaya* or the commitments of the vajra vehicle.

I would like to note that this code of conduct inherently aligns with the nature of reality. Even if the Buddha had never come, even if the Buddha had ever turned a wheel of Dharma, the nature of reality will always be the supreme truth because that is the nature of truth. I believe that the laws we have in Bhutan were greatly influenced by the teachings first by the arrival of the guru Padmasambhava in the eight century and in the seventeenth century when the *Zhabdrung* Ngawang Namgyal introduced the temporal and spiritual systems he formulated what is popularly knowns as *Gyalthrim Sergi Nyashing* and *Choeythrim Dhargi Dhuephey* (རྒྱལ་ཁྲིམས་གཞེར་གྱི་གཞའ་ཤེང་། ཆོས་ཁྲིམས་དར་གྱི་མདུད་ཕྱུང་།).

If I may quote རྒྱལ་ཁྲིམས་གཞེར་གྱི་གཞའ་ཤེང་། written by the great *Zhabdrung Rinpoche* ཞབས་གསུམ་ཆོས་ཀྱི་རྒྱལ་པོ་དཔལ་འབྲུག་པ་རིན་པོ་ཆེ་ དབུ་དབང་ངག་གི་དབང་པོ་ཐོག་ལས་རྣམ་པར་རྒྱལ་བའི་བཀའ་ཁྲིམས་གཞེར་གྱི་གཞའ་ཤེང་ཞེས་བྱ་བའི་གཏམ། So, this is the name of the *Kathrim* (བཀའ་ཁྲིམས།).

In *Gyalthrim Sergi Nyashing*, I quote རང་ཡང་བརྟན་ཅིང་ཐུ་དང་ མི་ཚོས་གཙང་མ་བསྲུ་དུག་གི་ཁྲིམ་ལ་གནས་ཤིང་ གཞན་ཡང་དེ་ལ་འགོད་པ་ནི་རྒྱལ་ཁྲིམས་ཀྱི་སྙིང་པོ་ཡིན། and the translation is the essence of temporal law is to adhere oneself to the five precepts and sixteen acts of social piety. That is the essence of the temporal law. The temporal laws were set to resemble a golden yoke as described as a *serghi nyashing* (གཞེར་གྱི་གཞའ་ཤེང) of golden yoke. The meaning to be understood is that we distribute the weight equally signifying equality under the law without status, caste, creed or colour. And the penalty goes heavier with the degree of crime. The *Sergi Nyashing* or the golden yoke in my understanding, refers to the sacredness of the law. Just as the golden yoke serves in ploughing the fertile land and brings to the fruition of countless of fruits that the *Gyalthrim Sergi Nyashing* serves in resolving conflicts and strive, resolving misunderstanding, resolving discomfort, disorders, disharmony within our society in one's family, in

the community, in the nation and the environment and the most importantly to keep our body, speech and mind balanced. The Bhutanese legal system based on *Gaylthrim Sergi Nyashing*, I believe it is a legacy of *Zhabdrung Ngawang Namgyal* and spaced on the first set of law promulgated by the *Zhabdrung Rinpoche*. This law is based on the fundamental teachings of Buddhism and encourages the practice of seeking pious or virtues of social priority referred to as *michoey Tsangma Chudru* (མི་ཆོས་གཙང་མ་བརྒྱ་དྲུག) and ten precepts referred to as *Lhachoey Gewa Chu* (ལྷ་ཆོས་དགེ་བ་བཅུ་)

Deeply influenced by Buddhism, the laws kept evolving over the centuries, in accordance with changes in culture and the way of life. And it is very much in harmony with the teachings of the *Vinaya*. In the *Vinaya* the Buddha has said འདུལ་བ་ཡུལ་དང་བསྟུན་ meaning that the Vinaya should accord with the place and the current situation. So, chronologically over the last four hundred years the forms of government systems evolved from monastic government in the seventeenth century to the institution of monarchy in 1907 to the present-day system of Democratic Constitutional Monarchy. Despite this evolution, the core essence of Buddhist principles has not changed materially with the passage of time. Therefore, the laws of *Zhabdrung* Ngawang Namgyal still serve as the basis of foundation of the contemporary Buddhist legal system.

In regard to the spiritual law, it is stated in the *Chayig* or monastic code of etiquette by *Zhabdrung Rinpoche* that to achieve to the discipline of vinaya in one's outer conduct inwardly following the Boddhisattva path and secretly applying the Vajrayana teachings so that one individual can practice the basic Theravada, Mahayana, and Vajrayana. Simultaneously which we called *Sumden Dorji Zinpa* (གསུམ་ལྡན་རྡོ་རྗེ་འཛིན་པ) or the Vajra holder of the three-moral ethics.

As the famous idioms that the historians had put it in a beautiful way (རྒྱ་ཁྲིམས་མེད་པ་ལ་ཁྲིམས། རྩ་ལྟང་མེད་པ་ལ་ལྟང་། - "law to the lawless south and handle to the handle less pot"). It is very clear that a happiness, peace, sense of security, safety, prosperity, and harmony flourished in Bhutan after the law has been established. There are

many historians who describe the era with this beautiful metaphor of an old woman around with the basket of gold (མ་ཀྱན་གསེར་ཏུ་བ་བཞུ་བ) without any obstacles. So, that was the era which is clean and result of having established the law by *Zhabdrung Rinpoche.*

In our day to day life, it is very clear that the karmic results of non-virtuous actions come in three ways. The (རྣམ་སྨིན་གྱི་འབྲས་བུ) which is called as "sure result," the result corresponding to causes which is called as the (རྒྱུ་མཐུན་གྱི་འབྲས་བུ) and the དབང་གི་འབྲས་བུ or the dominant results. For example, if one has engaged in the act of killing sentient beings, this has three effects. The long-term effect is to be reincarnated at a lower level, the second result is to have the inclination to kill and to harm others, and third result is to suffer from sicknesses and have a short life. In the same way, if one has committed theft, it is said that one will be reborn in a harsh land with harsh weathers and one will be deprived of external and internal wealth.

I would like to note that whether it is the Vinaya, whether it is the Boddhisattva's laws, Boddhisattva's precepts, or whether it is a Vajrayana precepts, the purpose of observing the law is to create harmony, to bring harmony, to open one's enclosed views, open our mind, to open our heart, to extend our warm heartedness, to utilize what we called *Tathagata Garva* (ཏ་ཐ་གཱ་ཏ་གརྦྷ) or the basic goodness that are inherited in our mind as said by the Buddha.

In conclusion, I believe that all the laws are the root of all kinds of happiness that we have created.

Thank you very much.

Practical Realities of Acting on a Buddhist Legal Ethic: a Practitioner's Perspective

Dasho Shera Lhundrup[1]

It is difficult for me to live up to the information you have received from the preceding four eminent speakers. I think you will also see the topic I have to speak on has already been covered. I will make it very easy on you and I will not use too much of your precious time. But at the same time, I must draw some conclusions on what has been presented to now.

I think Professor Rebecca French has actually made my initial point: that there are laws and legal systems in the world based on Hinduism and the *Dharma Shastra*, those based on divine revelations in the Muslim world, at Medina to Mohammad, those based on Judaism and Moses's divine revelations, and then we have those based on Christianity. Then we have Chinese, mostly based on Confucianism. But today our preference would be aside more towards Lao Tzu than Confucius, because of the one fact that we don't like being told what to do and not to do.

We would like to be left alone and decide ourselves. I think that is the essence of democracy, but not to the extent that you would go off a cliff. That is why the reality must be that there is a limitation to everything. And then, I think, all of you are going to be lawyers. This workshop is mostly targeted towards the students to the greater knowledge and cite into the name of GNH & Law/Buddhism and Law, I think our objective is to bring the students, more openly, into the insights of some of the greater moral authorities.

We know you will be receiving training in *Nyen-ngag* (poetry): saying things in a very poetic, in a very acceptive manner to the listeners. That is what all of us are looking for—that's what the salesman today wants to learn about—to

[1] Attorney General of Bhutan.

attract, to have the attention of the people to whom he wants to sell. That is *Nyen-ngag*!

And the art that is known as the *Tshema*: the scientific reason, the knowledge he said, the wisdom he said, Sherub, he said (referring to earlier speaker on Tshema). I think these are all targeted towards providing you with a roundup of views. That is what we call wholesome views, not in a fragmented manner. I think most of the things have been percolated into our laws. Rebecca has mentioned repeatedly that I think we have done a lot of codifying Buddhist values into our laws–we have done it–but if someone is to pinpoint "this is it, this is from Buddhism," you wouldn't know, because it has to be said in a secular manner, so that the acceptance is universal. A Hindu personal law, a Muslim personal law, Christian personal laws… When you have too many varieties, what do you get out of it? The complexity you get. There is need to simplify, there is a need to treat everyone alike, uniformly.

What brings it? The civil code brings it. The uniform code brings it. Our penal code brings it. Our Civil and Criminal Procedure Code. Treating everyone alike–it doesn't matter what your religions, caste, creed is. You are treated alike. That is what all of us are looking for. So that the law truly treats you at equal platform. Giving meaning that everybody is equal before the law.

And in Bhutan, you might agree with me, some of you at least, that it is much easier for us, because diversity here, comparing diversity of personal laws are non-existent, almost. Some of the customary laws that come from different Dzongkhags, different communities, did prevail at times, but they were all related to marriage, marital rights in property and inheritance, which were not discriminatory. To be specific, they were positively discriminatory, I would say, in that–in a house, men must go out, and the lands and all cattle must be inherited by daughters, because the woman is a bigger section of the children.

So with this, I would like to percolate down the theory that everything must be relevant to ground realities. If the law, the constitutions, if procedures are

to sustain on its own, it must have subscribers. It must have its own popularity and equal limitations. That, you can achieve only when there are no protests against it. And we have civil codes, we have inheritance act. I think some of the communities, they might–in the olden days might have done things their own way, but now we have come practically down to the same laws. Now what we can learn from here for the students of JSW Law, is that–yesterday, the Honourable President, Her Royal Highness, said we would like to groom this set of students. They will be organic, home-grown products, trained to serve and lead communities, to provide leadership at various levels in their time. I think this is very, very important for us to note, because the legislature has often gone wrong, cutting and pasting laws from abroad. We are in want of home-grown expertise. There is a local shortage of experts, and we worshipped people who could do provide such expertise.

But what we did not realize was, this expertise was outside of our social context. Some of the international conventions that we have signed to, which become by operation of our Constitution part of our domestic law, are causing us lots of difficulties. A classic example is the age of sexual consent. Girls used to be eligible for marriage by sixteen, men by eighteen. Yet we ratified international laws against discriminations, gender inequalities, all this. In our effort, endeavour to obtain seeming gender equality, we got actually gender inequality. Because I would like to share with you the practical realities of what is happening.

I come from an office where we file charges every day. Drug abuse is increasing, burglary is increasing, sexual abuse is increasing. Maybe it is not increasing, but its visibility is increasing. The fact is that our figures show it is increasing. Now, I tirelessly propagate this, when I want people to say “no” to the drugs. When we went to actually disseminate information, whenever we have time for ourselves. When we went to some high schools and spoke to some of the students, what I have said: in locking up one young man, there is multiples of locking up: firstly–is the young man married, young man is always a son of our parents. Parents lose first a young man to prison: he could have been the hopes and

aspirations of the parents. Is he married, having a child? If the answers are yes, wife lost a husband, child lost a father.

It does not stop there. The worst thing is the national burden increases. We have to take this gentleman to prison. Feed him, clothe him, treat him whenever he is ill, and guard him.

And it does not stop there. A young man is the most economically productive age, yet you are locking him up when he is most productive to the State. Therefore, we are locking up economic opportunity as well, when we incarcerate this man. Should not we be coming out of the old boxes and indeed coming up with something else, rather than physical locking up. Nature is running short of vegetables. We would like to pursue our self-reliance as much as possible. Aren't they the most productive people that we can actually make use of tax from, and send them, pay them, let them grow vegetables, guard them? And yet, some of them will become the best vegetable growers, horticulturalists.

We don't know. We are not giving opportunity. We are not willing to come out of boxes. These are the practical realties that pains you. This time we tried to bring some of the reports to the governments. But there is a limitation to whatever you can do, because of not only of time, but also resources. And the normal burdens of everyday functionaries that we have to carry out. There is a limitation to it, but we tried our best to suggest some of the recommendations that we have come across, and worthy of. These are the areas that we need to think about. These are the areas worthy of thinking about. So, this is my opinion. Other nations are progressing very fast. Our democratic nations, left to the choices.

I think we should grow very responsible on our own, by our own choice. Because–now, let us fall back to Buddhism. When are you happy, actually? Did the millionaires that you and I know die of happiness? If so, I have not heard of it. The very creator of Apple iPhone died lamenting it. Didn't have the time to relish the wealth that he has accumulated. Our own very well-to-do people die. Nothing could save them, in spite of their capability to spend and change their heart and

transplant any organs they wanted. So where is the root of happiness then? Is it in talking and philosophizing? Is it economic strength or military might? Is the U.S. happier than ever before? Is a country that develops nuclear weapons happier than before? We see the multiplications of disgruntlement in their citizenries, not happiness. That simply shows that is the wrong direction.

That is why, the happiness needs to be looked at through the eyes of simplicity. Try to look through the translucent eyes of Buddha. His literature you don't have to read. All this balminess. One saying is enough. What Buddha has said. He was saying this to his cousin, Ananda. He wanted to plant one tree, Bodhi tree, in a place donated by a local king. And he asked, "Should we bring one sapling of that tree, or should we bring one seed?" Then Buddha replied, "Ananda: does the tree lie in the seed or seed lie in the tree?" In that connection, he says: "All things appear and disappear, because of cause and effect. Nothing is on their own, everything is connected to everything else."

Which means drafting laws in a compartmentalized way is not a service. You are disconnecting yourselves from others. That is why you have contradictions. That is why you need amendments to laws as soon as they are enacted. Because you haven't bothered, had the decency, courtesy, to go on the other side of the world and see, will it not contradict there?

Anyway, what I wanted to say is, the happiness lies in self-created, self-chosen contentment. If you simply say, "I have had enough of it, I don't want to rise above this, I want nothing other than this–Attorney General Yeshi, I am happy, I have done my life, I must go back, farm, do something–social services, that's all I wanted to do."

This becomes a PowerPoint for me or my happiness and contentment. But if I keep always stooging others to rise again, for another appointment–please that. Does happiness bleed from there? No! Every time you expect, the shadow is dejection fruit. If you don't get it, you get the worst kind of dejection. That's why people suffer from different types of mental diseases--mental problems.

And with this, I would like to thank the organizers. I will not share much more, because it is going to be a repetition of what you have heard in the two days, and I am simply a flying floating ember amongst the midst of all these stars of intellectuals, so this is it. Thank you so much for this opportunity.

Teaching Indigenous Law in a "Modern" Jurisdiction

Jeremy Webber[1]

In this brief article, I will introduce the programme in Canadian Common Law and Indigenous Peoples' Law that we have developed at the University of Victoria. I will say a few words about the challenges that we have faced in the course of its development, emphasizing those that I believe relate most closely to your aspirations at the Jigme Singye Wangchuck School of Law.[2]

I. UVic's Joint Programme in Canadian Common Law (JD) and Indigenous Legal Orders (JID):

The University of Victoria's new programme attempts for the first time to engage in depth with Indigenous legal orders–the legal orders of the Indigenous peoples of Canada–in intense comparison with Canadian Common Law. It will both teach the Common Law in depth and introduce students to a range of Indigenous legal traditions: how to work with, reason with, and build upon those traditions to do the work of law in Indigenous societies. The programme therefore seeks, like your new programme here, to bring together two kinds of law which have often been considered to be quite different from one another: 1) state law–the body of formal law developed by state institutions, including the legislature and the courts; and 2) customary law–the body of informal law developed over time by communities, through their own interaction and deliberation, and which continues to be held and developed by those communities today.

In our programme, in students' first year, the students will study each of these bodies of law in parallel, through intensive comparison between them. They

[1] Dean and Professor of Law, University of Victoria Faculty of Law.
[2] A brochure that describes the programme is available online at https://www.uvic.ca/law/assets/docs/jid/jidbrochureravennov2018web.pdf. The programme's structure and requirements are available online at https://www.uvic.ca/law/assets/docs/jid/jidbrochureravennov2018web.pdf.

will study law "transsystemically"–a term that has been used to describe the teaching of the Common Law and the Civil Law at McGill University, Montreal, Canada.[3] Thus, when the students in the new UVic programme study Constitutional Law with my colleague Professor John Borrows, they will study Canadian constitutional law, but they will do so through comparison with the way in which the Anishinabe people of central Canada deal with issues of social organization, political organization and decision making.[4] In Property Law, taught by another of our Indigenous colleagues, Professor Val Napoleon, students will study both Canadian Common Law and the law with respect to property of the Gitksan people of northwest British Columbia (the westernmost province in Canada, in which the University of Victoria is located).[5] In Criminal Law, with a Cree scholar who has just joined us, Dr David Milward, they will study Canadian law and the law with respect to harmful conduct in Canada's Cree legal traditions.

The programme will involve two full semesters of in-community work, where the students will study law in the communities where that law is lived, working with the people who bear those traditions, examining how those legal traditions are being mobilized by the peoples in their daily lives and in the governance of their communities.

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[3] For an early statement of the McGill programme's aims, see: Daniel Jutras, "Transsystemic Legal Education: Legal Traditions Meet in the Classroom" in Keith S Sobion, ed, *Legal Education: 2000 and Beyond* (Kingston Jamaica: West Indian Law Journal, 1998) 1-6 (downloadable from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2820156). For a critical re-evaluation of the term "transsystemic" but not the underlying project, see Daniel Jutras, "Pour en finir avec la Transystémie (sic)", in Y. Emerich, *Repenser les paradigmes: quel avenir pour l'approche transsystémique du droit?* (Cowansville: Les Éditions Yvon Blais, forthcoming).

[4] For a volume designed to lay the foundation for such an approach, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).

[5] For an overview of Gitksan law, see Val Napoleon, *Ayook: Gitksan Legal Order, Law and Legal Theory* (PhD, University of Victoria, 2009) [unpublished] (online: https://dspace.library.uvic.ca/bitstream/handle/1828/1392/napoleon%20dissertation%20April%2026-09.pdf?sequence=1&isAllowed=y).

This new programme will take students one more year than it takes students to earn an LL.B. alone but, at the end of four years, the students will obtain two degrees: one in Canadian Common Law (JD), and the other in Indigenous legal orders (a new degree, styled the JID).

So why are we undertaking this? It springs from a desire to give Indigenous legal traditions the attention they deserve, led by our Indigenous colleagues, especially Professors Borrows and Napoleon. Professor Borrows is Anishinabe/Ojibway from the Chippewa of the Nawash First Nation in Cape Croker, Ontario, Canada. The programme was originally his idea. I remember him mentioning his aspiration to me back in 2004 when we were both together on a beach in Australia, of all places. The other principal leader of the programme is Professor Val Napoleon. She is of Saulteau, Dunne-Za, and Cree heritage from the Saulteau First Nation in northeast British Columbia, although she also lived for many years among the Gitksan people of northwest British Columbia, where she was adopted into the Gitanyow (Gitksan) House of Luuxhon, Ganada (Frog) Clan. When they introduced the idea, the rest of us were excited–challenged by the prospect, interested in what could be discovered from an intensity of engagement with Indigenous legal traditions, seeing the value in approaching those traditions with something like the intensity of engagement that we expect students to bring to the Common Law.

And of course, the proposal was especially meaningful for our Indigenous students. At the University of Victoria, just under 10% of our students in recent years have been Indigenous, drawn from the three great categories of Indigenous peoples in Canada: First Nations, Inuit, and Métis. Although we have traditionally given these students a wonderful background in the Common Law, and although we have long been leaders in the study of Indigenous legal orders, even we, with all our work in the field, have not given our Indigenous students the tools they need to think deeply about the relationship between their legal traditions and Canadian Common Law. We have not helped them see how what they were learning about

the Common Law might draw upon, might interact favourably with, might build upon, their engagement with their own legal traditions.

Moreover, it is becoming increasingly clear that the programme also meets an intensely practical need. There has been a growing trend in Canada towards Indigenous peoples' exercise of self-government–towards Indigenous communities, Indigenous peoples, governing themselves.[6] This of course means Indigenous peoples drawing upon their own traditions to do the work of law in their communities, but we in the law schools have not sufficiently supported that aspiration. This programme is designed to support it. Moreover, it meets an international need. Customary legal traditions are an indispensable resource for communities worldwide–a kind of normative order that has the great benefit of being understood, accepted, and retained by the communities to which it applies. Yet it is a resource that has been neglected. This programme explores how state law can interact constructively rather than destructively with customary legal orders.

This is an enormous commitment for our law school. It means an increase of more than 25 percent in our student load. And of course, the programme is on top of all the other things that we already do. We are very proud of those things, and it is important that the students in this programme also have access to that expertise. Hence we have sought to create the new programme without in any way diverting resources from our existing offerings. The new programme nevertheless involves a whole suite of unprecedented courses that can achieve the comparative aims. It therefore requires an increase in the number of faculty members: six new faculty will be joining us over the next few years, bringing our total faculty from about 30 to 36. The first two of these new faculty members were hired in July

[6] For an overview of the development of Indigenous rights in Canada, including the increasing focus on self-government, see: Christina Godlewska and Jeremy Webber, "The *Calder* Decision, Aboriginal Title, Treaties, and the Nisga'a" in Hamar Foster, Heather Raven, and Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the* Calder *Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007), 1 (online: https://www.ubcpress.ca/asset/9076/1/9780774814034.pdf).

2018: David Milward, a Cree scholar from Saskatchewan; and Sarah Morales, a Coast Salish scholar, member of the Cowichan Tribes, from just north of Victoria in British Columbia.

It is important to remember that the programme is the first of its kind in the world. There is no similar programme. So we have faced a challenge that would be familiar to Dean Sangay Dorjee, namely how to assemble the resources for a completely new programme, one that seeks to teach law in a new way, engaging not only with the law produced by state institutions but also with those forms of law lived in the communities. I am pleased to say that we have, like you, secured strong support from a wide array of funders, in our case notably the Government of British Columbia, a number of significant private foundations (including the Law Foundation of British Columbia and the McConnell Foundation), an important cooperative private enterprise (VanCity Credit Union), many individuals and law firms, and, we expect soon, the Government of Canada.

II. The Intellectual Project, the Intellectual Challenges, of the JD/JID:

My focus today, however, will not be on the considerable practical challenge of amassing those resources, but rather on the intellectual challenges. We are used to dealing with law that is created by the state, but how do we cope with, how do we adjust our methods to, the study of legal orders that come from below–to customary legal orders?

We have pursued those intellectual challenges at the same time as we have sought to solve the practical challenges. The programme builds upon fourteen years of experimentation at the University of Victoria. Let me mention just two of those initiatives. One was the pathbreaking Akitsiraq Programme, in which, between 2001 and 2005, UVic Law delivered a full law degree to a cohort of Inuit students in Iqaluit, the arctic capital of the then newly-established Inuit-majority territory of Nunavut. That programme was an early, comprehensive, and very

successful initiative to provide a legal education that incorporated both Canadian and Inuit law, from which we learned many lessons.

The second is the work of our Indigenous Law Research Unit (ILRU) founded and led by Professor Napoleon, created in 2012, which works intensively with Indigenous communities to identify the legal resources of the communities for addressing the challenges that they face. The communities formulate their own objectives, bring them to ILRU, and work with the Unit's personnel to identify the principles and processes, within their own legal traditions, that inform those areas. ILRU's work has been a revelation, enabling us to explore the richness of Indigenous legal traditions and begin the process, in collaboration with Indigenous communities, of imagining how they might be best employed today. Although we began thinking about the JD/JID programme long before ILRU's founding, I now have real trouble seeing how we could have established the programme without the foundation laid so carefully and rigorously by ILRU. You can find some of that research here.

So what are the challenges of building the JD/JID programme, and what have we learned along the way? There are so many. Let me introduce five.

1. What is the nature and scope of customary law? Is it truly law?

First, there is the challenge of developing concepts appropriate to the nature of customary law. Some people question whether customary law–law established and maintained outside the state–truly is law.[7] Even if it is, where, in such a context, does "law" begin and where does it end? This question was central to Rebecca French's presentation at this conference. It is a question that we at UVic are asked from time to time, but that I confess we do not see much utility in asking ourselves.

[7] See, for example, Simon Roberts, "After Government? On Representing Law Without the State" (2005) 68
Modern Law Review 1.

It is the product, I think, of a complete identification of law with the state–of a failure on the part of the questioner to imagine any kind of law without the state.

There certainly are challenges in understanding customary law. Those of us who have been trained exclusively in state law do have trouble comprehending a kind of law that originates from other sources, often with no state authorization whatever. But the task of responding to those challenges is not rendered easier by insisting that customary law have the same character as state law. One reason is that, in the absence of a state, law *doesn't* have a high degree of differentiation from other forms of normativity. There is not the same distinction between law and morality, or between legal principles and ethical principles, because, in a fully customary system where the state does not play a role, all forms of normativity are governed and enforced by roughly similar social processes, not by the specialized institutions of a state. One way to think about this is that, in a system of state law, responsibility for one subset of a society's normative order is assumed by the state, while the balance continues to be left to social processes other than the state. The difference is essentially institutional: the institutions of the state only take responsibility for the subset, not for the balance. In contrast, in customary law there aren't the same specialized institutions and thus there isn't the same need to create a sharp distinction between what is law and what is not law. There is instead a spectrum of social norms, with those at one end looking more like the norms that, in state systems, states enforce as law, and those at the other end looking more like a matter of personal values, with much shading in-between.

Thus, our first answer to the challenge of whether customary law truly is law is to challenge the assumptions that underlie the question in the first place–to *not* insist upon a hard and fast distinction between law and other forms of normativity but, for the purposes of initial analysis, to include all socially-

generated norms. Customary law potentially includes *all* social determination and application of norms.[8]

Of course, to the extent that state institutions are asked to recognize customary law, distinctions do have to be generated. Then societies do need to determine what norms should be recognized by state institutions and what norms should remain within a non-state realm. But this is a secondary, institutional question. The need to make such a distinction is generated by the need to define state institutions' jurisdiction, not by, or at least not simply by, the inherent quality of the norms.

One further consequence flows from the realization that state recognition turns on institutional considerations rather than simply the nature of customary law as law: the mere fact that there is customary law does not mean that the customary law should be interpreted and applied by state institutions. Often, the institutions of customary law work very differently from state institutions. They may, for example, place much more emphasis on mediation than adjudication. They may produce remedies very different from those of state institutions. In the Indigenous legal traditions of North America, for example, authority to interpret the law is often distributed very widely within society and people are, as a result, reluctant to impose their interpretations on others; the methods of dispute settlement tend, then, to be more allusive and mediational, often involving processes of statement and counter-statement among representatives of the society as a whole.[9] In such circumstances, the use of state institutions might significantly distort the customary law. When a question of customary law arises, it may be better for it to

[8] See Jeremy Webber, "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall Law Journal 167 (online: https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1316&context=ohlj); Jeremy Webber, "The Grammar of Customary Law" (2009) 54 McGill Law Journal 579 (online: http://lawjournal.mcgill.ca/userfiles/other/1453703-Webber.pdf).

[9] See, for example, Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" in Jeremy Webber & Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010), 45.

continue to be interpreted and applied by customary institutions, not removed from customary institutions, and enforced by the state.

The scope and contours of customary law are potentially very different, then, from those of state law. UVic's new JD/JID programme, like the new programme at JSW Law, does seek to compare state-created and customary forms of law and promote their respectful interaction. We do, then, need some provisional understanding of the most pressing areas on which to focus. In that regard, rather than asking "What is law?", I very much like the way in which my colleague Professor Napoleon frames her analysis. She tends to ask, "Where and how is the work of law – are the functions of law – performed within society?"

2. How is customary law transmitted and applied? What are the distinctive forms of customary law?

The second challenge that we have had to wrestle with is the means by which Indigenous legal orders are carried and transmitted. What intellectual tools do we need to understand those modes of transmission? How do we introduce our students to the styles of reasoning and decision-making appropriate to customary law?

My colleague John Borrows emphasizes the multiplicity of forms that Indigenous law can take.[10] He distinguishes between natural law, where people in his community derive legal principles directly from observation of the natural order; sacred law, where they believe that the laws emerge from interactions with the spirit world; customary law, a term that he uses narrowly to mean the principles that emerge out of the interaction of community members through time (through interpersonal interaction, not through reflection on a natural or spiritual realm); positive law, in which Indigenous communities have employed formal mechanisms–mechanisms analogous to state structures–to create law; deliberative law, where members of the community meet and debate what is their law; and he

[10] Borrows, *supra* note 2, 23-58.

acknowledges that there may be other forms of law as well. Each has its own distinctive forms of expression, modes of transmission, and institutional forms.

One very common method by which legal knowledge is retained and transmitted among North American Indigenous peoples is through stories (in which category I include oral histories). Stories embody two common characteristics of customary law. First, they are marked by the wide distribution of authority in those peoples. Everyone can tell a story; everyone can offer an opinion on what a story means–although, of course, particular individuals come to be known for the accuracy of their recounting and the wisdom of their interpretations. Second, stories are open to a wide diversity of insights, as people focus and expand upon different aspects. Stories are, then, inherently open-ended. How then does one identify and work with their legal content?

To a lawyer preoccupied with the centralization of authority characteristic of states, such an openness of recounting and interpretation can seem extraordinary – not something conducive to social stability, consistency of decision-making, or the affirmation of law. I confess that it took me some time to understand how a society could work like that. But I am now convinced that my difficulty was more a function of my limitations than those of customary law. The Common Law, for example, is certainly not free from a diversity of interpretations. On the contrary, the task of a lawyer–and therefore the task of legal training in any good law school–focuses on how to reason among competing interpretations, how to weigh them, and how to test and refine them. The distinctive quality of a lawyer is not encyclopaedic knowledge but judgement–and of course, in any legal order, there are simultaneously a range of potential judgements in play. Judicial decisions sift those potential interpretations, rejecting some, affirming others, and zeroing in on a specific result for the case before the court, but they certainly do not end the task of interpretation. On the contrary, judicial decisions themselves become yet another authoritative text, themselves subject to further interpretation. I could

make a similar argument with respect to the texts, methods, and institutions of the Civil Law.

I don't need to diminish the role of authoritative decision-making, but I do want us to recognize it for what it is: not the affirmation of a single right answer that exhausts the meaning of the text being interpreted but rather a weighing of possibilities, the rejection of some alternatives and the affirmation of others, and the determination of a result for the purposes of deciding the matter before the tribunal. All those functions are present in customary legal orders. The functions are performed differently, often more allusively, less definitively, in a manner that is indistinguishable from other forms of social deliberation. We need to take those differences seriously and reflect carefully upon their significance, but they too, in their particular social contexts, do the work of law.

One consequence of this realization is that the stories and oral histories of Indigenous peoples can be approached with a level of commitment and rigour comparable to those we bring to other legal texts. That is the absolute heart of the work of ILRU–the focus of ILRU's express methodological experimentation. That experimentation continues, but it is intriguing that some of the early methods were expressly inspired by the ways in which Common Lawyers work with cases.[11] It is rigorous in the approach it brings to the legal "texts": the stories and the oral histories. ILRU is careful to source each of the accounts with which it works. It acknowledges the diversity of accounts present in the community, including accounts that may be shaped by gender and other kinds of social positioning. It compares the content held by different stories and works up syntheses of the

[11] See Hadley Friedland, "Reflective Frameworks: Methods for Accessing, Understanding, and Applying Indigenous Law" (2012) 11 Indigenous Law Journal 1 (online: https://jps.library.utoronto.ca/index.php/ilj/article/view/27628/20360); Hadley Friedland & Val Napoleon, "Gathering the Threads: Developing a Methodology for Researching and Rebuilding Indigenous Legal Traditions" (2015-2016) 1:1 Lakehead Law Journal 16 at 21-26 (online: https://www.uvic.ca/law/assets/docs/ilru/Gathering%20the%20Threads%20Lakehead%20Law%20Journal%202015%20Friedland%20Napoleon%20.pdf).

principles, but it continues to acknowledge that there are a range of interpretations, sometimes subject to fierce conflict and even power plays. ILRU's researchers are careful not to arrogate to themselves the entitlement to say what is the 'true' tradition, but accept that there will be a range of interpretations, and include, within their analyses, the mechanisms by which interpretations are criticized, debated, and the law reformed.

A second consequence, also absolutely fundamental to the JD/JID programme, is the need to approach customary law critically. A legal tradition, in order to live, needs to be employed in practice, and that work requires that one consider carefully how the values and judgements present in the law apply to the circumstances one confronts in daily life. One has to test and refine one's understanding of the law. One has to examine the circumstances carefully. And one must try, with all the insight one can muster, to judge how the law ought best to apply to those circumstances. One cannot perform that role without inquiring deeply into the meaning and adequacy of one's existing interpretations.

3. How can the JD/JID cope with the diversity of legal traditions?

Not only is there a diversity of interpretations within a particular legal tradition, but there is a wide array of Indigenous peoples in Canada–a wide array, then, of Indigenous languages and of languages of social ordering. There are, for example, at least ten broad linguistic families among Indigenous peoples in Canada, bearing at least as many legal traditions. We cannot teach them all in a single programme, so how should we proceed?

One thing we are not doing is teaching a single pan-Canadian Indigenous legal order–one that, currently, does not exist and that no one practices. The whole idea of the JD/JID programme is to develop tools for working with principles that are actively held within communities, that have traction within those communities, that have resonance. That said, we do need to support students from a wide array of Indigenous legal traditions–more traditions than we will be able to teach. We

will therefore work with a sampling of Indigenous legal traditions, so that students will be introduced to five or six in the course of their studies. They won't see the entirety of those traditions–the traditions are too rich to cover in their entirety–but the students will engage with them deeply enough to have grasped their distinctive principles, processes, and forms of reasoning. Moreover, the traditions will be chosen so that students see a representative range of approaches and institutions. They will therefore, we hope, graduate with skills that can be applied to other peoples' law. They won't have a complete training in any single tradition–when working with any tradition, they will still need to work closely with those community members who are expert in their traditions–but we will have taught students a range of skills that will allow them to approach Indigenous legal traditions rigorously and with integrity. They will have tools for learning, not an exhaustive knowledge of any particular people's law.

This is something that good law schools do anyway. Some schools pretend to teach the entirety of a jurisdiction's law, but no school could manage that feat. The law is simply too complex and too extensive. Moreover it is dynamic, continually evolving through the making and interpretation of laws; if one focuses simply on teaching today's rules, the students' knowledge will soon be obsolete. Instead, we focus on the tools necessary for continually working with law. That includes the ability to interpret legal materials, to seek additional legal knowledge, and to contribute to the evolution of the law. In Indigenous legal traditions, the sampling approach is assisted by the fact that there *are* structural similarities among the traditions. Certain skills–how to reason through stories, how to work with local Indigenous experts, how to build a workable consensus in societies in which power is widely distributed and in which community members disagree, how to address conflict–will help students deal with analogous situations in other traditions. We will not, then, seek to displace the people who are knowledgeable about the law in the various communities. Rather, we will be training students who will be able to work with them and, in collaboration with them, with their law.

4. Conflict and Consensus in Indigenous Communities:

You will have noticed that I have not suggested that the existence of Indigenous legal traditions means that everyone believes the same things–
that conflict is absent, that harmony reigns. On the contrary, I have emphasized how legal authority is widely distributed in Indigenous communities, how interpretations of the peoples' law vary, and how Indigenous communities, like all human communities, have to find ways to address disagreement and conflict. A training in Indigenous law therefore requires that one engage with dispute settlement and the structures of governance–with the institutions through which disagreement is managed and decisions made. But does an approach to Indigenous law that focuses on disputes exaggerate the presence of conflict in Indigenous societies and neglect other dimensions of law? Are we ourselves, especially those of us who are non-Indigenous, so accustomed to studying dispute settlement that we have difficulty giving other legal mechanisms their due?

It is true that those who carry legal knowledge within Indigenous communities often speak as though law is a matter of personal learning and commitment–that law is about knowing how to act properly, how to live "in a good way."[12] They speak, then, as though law were primarily a matter of moral education. Indeed, we ourselves, at UVic, debate internally whether we over-emphasize conflict, and whether legal mechanisms other than dispute settlement–the telling of stories for example–should prompt us to place personal development and personal reformation at the heart of law. That debate continues. I don't suggest

[12] For an early expression of concern with there being too much emphasis on disputes in non-Indigenous studies of Indigenous law, see E Adamson Hoebel's report of a conversation with one of his Cheyenne informants, High Forehead, in the 1930s: E Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (New York: Atheneum, 1979 [1954]), 3-4. The phrase "in a good way" is simple but redolent of a significant ethics of action in the Coast Salish worldview (the Coast Salish are the Indigenous people of the part of Canada in which the University of Victoria is located). See, for example, Bruce Granville Miller, *Be of Good Mind: Essays on the Coast Salish* (Vancouver: UBC Press, 2007).

that we have settled it or can settle it. Debates like that are endemic to law. They capture the complex, multiply-stranded challenge of sustaining human community.

Indigenous legal orders (as my colleague Professor Napoleon likes to say) provide resources for thinking. Indigenous law is *not* about a blind return to the past, nor simply about following precedent. The practice of customary law requires that one apply the lessons of the past to today: that one probe the relevance of precedent, that one attempt to identify what is most important and what is inadequate in that precedent, that one remain alert to new considerations raised by new situations. It requires a continual process of normative attention, interpretation, consideration, and reformulation. Moreover, we act in societies in which people do have different objectives–indeed in societies in which people sometimes have little regard for the considerations that ought to shape their conduct. Customary law therefore must deal with debate, disagreement, disputes, and the processes by which decisions are made. It is not simply about the affirmation of an unchanging harmony.

And in doing so one has to recognize that people sometimes employ power to defend an unjustified position. There is, then, a distinctive element of our programme that engages critical approaches to law, including Indigenous feminism; it explores the position of women within communities, and their right to equal participation within those communities.

5. Customary Law in relation to State Law:

An underlying theme in all these challenges is how one should understand a social order that has developed without the centralized power typical of states–where the authority to articulate and interpret the law is widely distributed, where members accept that there will be different interpretations of the law, and where those differences can often persist for a long time without the imposition of a single "right" interpretation. How do such societies hang together? How do they work? The institutions of such societies are different from those of states. They force us

to investigate more subtle forms of cohesion: the linguistic and conceptual resources that a community deploys; its institutions for consensus building; the inherent value its members perceive in living together.

Those mechanisms hold lessons for all societies. Once one examines them, one begins to see them everywhere. Think, for example, of the non-state order to which states are parties: international law. Lawyers often try to use the structures of the state to understand international law, but that effort often involves the attempt to force square pegs into round holes. Instead, the institutions of international law are those of a non-state order, in which rival interpretive traditions can persist, and no one party is able to impose its interpretation, and rival approaches co-exist.

The final challenge of our JD/JID programme is therefore how to construct the intellectual apparatus and institutional interface for understanding customary legal orders in relation to the law of states. There are real challenges in doing so. The two kinds of law work in very different registers, with different time scales, and with different levels of finality. They are challenges that we will be considering for a very long time to come, and that have implications worldwide.

III. Final Comments

The Canadian literary theorist Ted Chamberlin has said that languages spoken only by small communities are "sacred sites."[13] They are sources of insight and wonder that are irreplaceable. The same is true of customary legal orders. Customary legal orders possess unique insights into how to structure and sustain human community. Above all, they enjoy the huge merit of being engrained within the societies they govern: they are held by the people; they speak the people's language; they respond to the lessons of everyday life; they are, ideally, present in the very terms by which community members say what constitutes right conduct and seek to realize that

[13] J Edward Chamberlin, *If This is Your Land, Where are Your Stories?: Finding Common Ground* (Toronto: Vintage Canada, 2003) at 16.

conduct in practice. To my mind, one can recognize those merits without denying the distinctive value of state law: its transparency; its emphasis on equal participation in self-government; its ethic of disinterested judgement (too often neglected in practice); its openness to larger scales of social organization, internal diversity, and the incorporation of new entrants (again often honoured in the breach); and its formal and therefore legible mechanisms for criticism and change. Our great challenge is to consider how those two forms of law ought to relate to one another, so that the benefits of each can be realized and so that a healthy, fruitful, good and, yes, happy community maintained.

That is, I think, the great challenge that the University of Victoria's JD/JID programme will be grappling with – well, really, forever. It is a challenge that you too have undertaken in your decision to combine a democratic constitution with the rich fabric of Bhutanese society, including the invaluable storehouse of knowledge carried within its varied traditions. We look forward to journeying along that path in conversation, learning from each other.

Clinical Legal Education at JSW Law

Dema Lham[1]

A few weeks ago, my colleague Khenpo Ngawang and I went to Paro to recruit new students, and while we were doing our presentation, a student asked if we also taught medicine. It was only later that we realized that the confusion stemmed from our frequent use of the phrase “law clinics.”

And this is not the first time anyone of us at the Law School has been asked this question. Many are not aware of what a law clinic is or clinical legal education is about. When we hear of the word "clinic" we always associate it with health or hospitals. Even for some of us who studied law in the 1990s or the early 2000s, this is a new concept. When I went to law school–and the Honourable Justices, my seniors, and my friends in the audience who went to the same law school as I did will agree with me–we did not have anything that was called law clinics. The only thing I remember doing was visiting some inmates at one of the prisons and talking to them, filling in a questionnaire, and making a report later on. And that was it.

When I think of it now, it almost makes me feel guilty. It was a *pro bono* activity which was a mandatory thing for all of us to do. While *pro bono* may be a part of activities that law clinics carry out, they are conceptually distinct from clinics. They are not sufficient or efficient. Fortunately, legal education has come a long way. It has undergone a lot of change over the years.

Nowadays, Clinical Legal Education programs exist in one form or another at law schools throughout the world. So it’s important to ask: what do we mean by clinical legal education? And, just as importantly, why clinical legal education?

Historically, clinical legal education was first developed in the United States as a part of an explicit social justice agenda, and primarily in response to a lack of access to legal services to the underprivileged. Many other countries–

[1] Senior Lecturer, JSW School of Law.

including India–slowly integrated clinical education as a part of their law school curriculum as a fundamental aspect of the law students' education.

Clinical education provides a learning experience that is difficult to replicate in the classroom setting. It provides an ability to instil values into student's practise of law, and to expose students to real clients with problems which are beyond mere textbook exercises. Along the way, students learn key skills, and research has shown that many of these skills will enable the students to gain confidence and an insight into how practised law is different than that learned through textbooks. In short, because of its interactive nature, clinical education promotes learning by doing. It also enables students to offer a valuable service to the local community, thus making them more responsible, more accountable and prepared for the future.

Here at JSW Law, we are fortunate to have clinical education integrated into our curriculum from the start. In many developing countries, clinics have emerged only after much struggle, often times resisted by traditional or doctrinaire law schools.

Here, we believe that clinics bridge the gap between theory and practice. They are of relevance not only to our students but also to faculty, to practitioners, to scholars, etc. And of course, their real-world orientation means that law clinics will also have a social impact, especially those have been designed in light of the Gross National Happiness.

In July 2016, the law school's Governing Council formally endorsed the proposal for its in-house clinical program, consisting of three separate clinics, focusing on Human Dignity, Appropriate Dispute Resolution, and Entrepreneurialism. These three initiatives have been defined in response to an informal assessment of Bhutan's legal needs, as well as a speculative assessment of the skills that will be most relevant to the professional successes of JSW Law's students upon graduation.

The vision of our clinical programme is:

1. Ensuring excellent training for our students;
2. Ensuring a beneficial special impact on the community and the country as a whole; and
3. Promoting high-quality academic insights emerging from the interplay between the clinic's theoretical teaching and its practical work.

In their fourth year, every JSW Law student will be assigned to one of the three Clinics, and will participate in two full semesters of clinical activity. During that time, they will take on individual projects or casework. They will also contribute to policy advocacy work on systemic issues falling within the Clinic's mandate.

Allow me to describe each of the three Clinics in a bit more detail. The Appropriate Dispute Resolution Clinic. In many countries, this clinic might be referred to as "Alternative Dispute Resolution." But in Bhutan, as we all know, most disputes are resolved informally and at the local level. Therefore, such mediated or negotiated resolution is not "alternative," Students enrolled in this Clinic will be trained to analyse complex disputes and utilize a broad range of dispute resolution strategies to help manage those issues, consistent with our formal law and traditional Bhutanese norms.

The Human Dignity Clinic. This Clinic is intended to help people who face threats to their dignity, irrespective of whether those threats are justiciable or non-justiciable. This will enable students to think broadly about how best to help their client. Students will be trained to use broad range of strategies to promote the ability of Bhutanese individuals and community to self-effectuate.

The Entrepreneurialism Clinic. This Clinic will train students to support Bhutanese small business entrepreneurs and innovators as they seek to generate new and sustainable source of income for themselves, their families and their communities.

Each of these three clinics is designed to inculcate in students an early appreciation for the skills and values they will need to rely upon as lawyers throughout their career. Students and faculty will work not only to assist affected individual clients but also to cultivate healthier, happier, and more cohesive communities, consistent with our guiding vision of GNH.

Even though our Clinics will not welcome our first students until 2021, our faculty and staff are already piloting two projects.

The first is with RENEW to help building consensus around a hybrid dispute resolution process for situations involving domestic violence, and also to provide training for RENEW's community-based support system volunteers. The dispute-resolution process combines elements of the formal and informal dispute resolution processes in Bhutan.

The second is a project to provide legal services and advice on organizational design principles to a farmers' co-op in Drachukha, Punakha, which is seeking to cultivate edible flowers. The Drachukha Flower Group will grow and harvest varieties of edible organic flowers. The group has been founded by three young women from a farming community in Drachukha Valley. Our Entrepreneurialism Clinic is developing a farmer-centric business and governance model for the project, so that the people in that community can benefit in the long run.

We are taking up these projects–four years before our student Clinics will open their doors–for two key reasons. First, we want to pilot our clinical model and lay the groundwork, so that when the students do arrive, we as faculty are better prepared. Second, we want to make JSW Law and our clinics known both within and outside of Bhutan.

I would like to close my presentation with a well-known proverb:

"I hear, and I forget,
I see, and I remember,

I do, and I understand”

This holds true for clinical legal education: a pedagogy that is experience-based, that will help us to inculcate important skills and values, and that gives us unique experience and opportunity for us to help and make a positive difference in our society. Clinical education, together with other forms of learning we adopt at the law school, will effectively cultivate GNH principles and values in our future Bhutanese lawyers.

International Legal Advisors and the Responsibility to Learn

Nick Booth[1]

Thank you for inviting me to this fascinating conference and giving me an opportunity to reflect on the interesting question of the principles which should guide international legal advisors in their work. We practitioners rush around without pausing for breath and thinking about how we do what we do, and why, so I offer these reflections in the hope that they can stimulate a broader discussion around the "soft" tools of our trade, in addition to our technical expertise.

I would like to propose four basic principles which I think I *try* to follow. They would be:

(1) Humility
(2) Shared values
(3) Evidence

and the last one, which in some ways sums up all of the others,

(4) Responsibility to learn, by which I mean the responsibility of the foreign advisor to learn.

Let me start with humility. I came to Asia ten years ago, to work for UNDP in Vietnam, in a job with the very grand title of "Policy Advisor on Rule of Law and Access to Justice." So of course, my first feeling was excitement. But it was very quickly followed by terror. Arriving in Asia for the first time, coming to work in a country with a more than 3,000-year history, a very sophisticated country, what could I offer to the Vietnamese about access to justice and the rule of law that they didn't know better than I did? And that feeling of terror never quite goes away.

[1] Team Leader, Democratic Governance & Peacebuilding, UNDP Bangkok.

And I have felt it all the more over the last five years since my job expanded to cover the whole of Asia-Pacific. That is 36 countries; two-thirds of the world's population; with 3,200 different languages, and that gives you some sense of the cultural variety in Asia-Pacific. I am acutely aware of how little I know about the countries I visit, compared with the counterparts that I will be working with.

So everything I do has to be shaped by that perspective of humility–the need to ask myself what basis my hosts would have to follow the advice of a visitor to their country. That leads me to my next principle, which is to identify shared values as the starting point for our conversation.

The good news is, as a United Nations advisor, I have one great advantage, which is that I am representing an organization which is built on an inspiring set of values which all our member states have committed to uphold. So my starting point as a development practitioner is the 2030 Agenda for Sustainable Development, which every member state endorsed in 2015, and the seventeen Sustainable Development Goals at the heart of that Agenda.

This conversation is always fruitful in Bhutan, because the concept of GNH was there before the 2030 Agenda was even thought of. Bhutan was a leader in propagating the notion of sustainable development, that you shouldn't focus only on the economic wealth of a country, but on all aspects of its sustainable development. In the 2030 Agenda we have grouped them into five P's: not just Prosperity, but also People, Peace, Partnerships, and Planet. So the United Nations has always had a mutually beneficial partnership with Bhutan, where we have learned much from each other.

For instance, just as the UN's sustainable development agenda has evolved to include the Rule of Law at the heart of the Agenda, reflecting its essential role in contributing to environmental protection, health, education, gender equality, and other forms of equality, Bhutan has also strengthened its own concept of GNH. I am delighted to see that in the next Five-Year Plan, the justice sector has a whole

NKRA of its own, reflecting its contribution to the whole of GNH and to sustainable development.

These shared values lead us also to a shared view about the challenges. And this is where a foreign advisor can bring value, because there is much one can learn from the rest of the world. Even though we are clear about our values, actually translating them into effective policies which change people's lives is extremely hard, and we all have a lot to learn from each other on that.

So, that naturally leads me to my third principle, which is that–under this framework of shared values, my contribution is to bring evidence to the conversation based on the experiences of other countries. This reflects a broader core value of the United Nations, the belief in resolving challenges through a respectful, evidence-based dialogue. The United Nations is founded on democratic principles, and one of the most important of these is the notion of public, reasoned, and respectful deliberative dialogue, in which all stakeholders in the community play a part. So I was fascinated to learn in this conference about the Bhutanese notion of *Tsa-Wa-Sum*, and particularly interested to hear of the evolution from the notion of "King, Country, Government," to "People, Country, King." That has great resonance for us at the United Nations. We are invited by governments, but we come to work for the whole country, and in a sense everyone in the country is our counterpart. And of course, for sustainable development and the 2030 Agenda, we focus on the commitment to leave no one behind, starting with the furthest behind first. So, part of my preparation for every country I visit is to try to learn about which groups are falling behind in their sustainable development. What are the challenges for gender equality in the country? (Every country faces such challenges.) What about people with disabilities? There is no country that has yet managed to level the playing field for people with disabilities. And so on.

When I ask those questions, in every country I always discover that we don't yet know enough. Because in every country, there is a lack of evidence and knowledge about some of the issues that face these groups that are being left

behind. And in every country, those groups are not yet able fully to participate in democratic processes. No country has yet fully included people with disabilities in policy-making, and therefore no country yet fully respects the equal rights of people with disabilities. And our contribution to the process of dialogue has two aspects. We contribute ideas from the outside. But we also support the process inside the country of learning more from its own stakeholders. That is why I have been delighted to hear the discussions in this conference about the need for more research about access to justice in Bhutan. When I first visited four years ago, I saw that in order to really strengthen access to justice in Bhutan, the first priority was to learn much more, at the grassroots level, about what are the real experiences—the lived realities—of different people in Bhutan and different groups. And until the country knows more about those, it won't be possible to have that full and equal deliberative dialogue in which everyone plays an equal part. So that is something that we can support and contribute to.

Of course, reaching answers to these problems through a dialogue process will take longer than asking an expert to arrive with a solution. But we need to understand that the best solutions are always the ones that come from this public deliberative dialogue. They will take longer, but the solutions that are reached following such a process are the ones that work and that stick, and that are accepted by a community. And when a country arrives at a solution through its own deliberative process, it will also have a deeper understanding of that solution and why it was adopted. So not only will it fit better, because it has been developed based on the national context, but it will be applied with more skill and understanding by the national actors.

And that is why, I never come in with the answers to a country's problems. As the principle of humility reminds us, we can never do that. But we can contribute to helping the country collectively find its answers.

And that leads me to the last principle which I need to follow as an outsider coming into another country, and that is that I also need to learn from the countries

I visit. Because if my main contribution is to share, then I need to take something away from each country I visit at the same time as bringing something to it.

One of the guiding questions for this panel session was, "what could we have as a principle to guide ourselves that is like the 'Do No Harm' Principle in Humanitarianism?" And I actually have one to offer, and it is all the better because it is not mine. It comes from Professor Jan Michiel-Otto, who recently retired as the Professor Law and Governance in Developing Countries at the University of Leiden. He has contributed enormously to the knowledge of how you do this job of strengthening law and governance in developing countries. And he thought very deeply over his forty-year career, and a few years ago, The Hague organized a big conference to come up with principles for rule of law in fragile contexts. And they asked him, as a very eminent professor, to come up with his principle. And his principle was, the principle of the responsibility to learn.

Even though these are principles for fragile contexts, I actually think they apply in *all* contexts. I would recommend this principle of the responsibility to learn for all advisors. So I would like to conclude by introducing you to nine maxims which Professor Otto set forth as the guiding precepts for the responsibility learn.

(1) Take a long-term perspective because it is contributing towards a long-term process of knowledge generation. This relates to a point I made earlier. When you engage in the process of debate and dialogue, you need to be prepared to stay in it for the long haul. And luckily, we at the UN are always in it for the long-haul, because we will always be the partners of our member countries, and many of the issues that I have been discussed with countries are still being discussed a decade later. And that is absolutely fine by me, especially if the country has made at least some progress on them.

(2) Support the evaluation and design of domestic policies as well as international assistance. That relates to my earlier discussion about the core value of advisors, to bring comparative experience to bear on the issues countries face.

To do that, we need robust systems to evaluate and learn from what we are doing, and what works and what doesn't work.

(3) Build bridges between domestic knowledge and international knowledge. I have discussed that that already. It is important that international advisors enrich the international principles, standards and guidance around justice and rule of law with a diversity of good examples from a range of different countries, cultures and legal systems. Our core values really are universal, but they do need to be applied in very different political and cultural contexts, and knowing how to do that requires a very nuanced understanding, along with the creative insight that there can be many different ways to achieve the same goal.

(4) Develop a research agenda which develops from domestic and local problems, *not* from foreign and international norms. So that is also related to my discussion above. A research agenda is vital, but it is rooted in the lived realities of the country.

(5) Address the local social realities–I have covered that, and it's closely related to the next one, (6) Be interdisciplinary using socio-legal concepts and methods. Because we are talking about the lived realities of people at the grassroots, and especially the poorest and most marginalized. This is not a dry legal matter. I am delighted that JSW Law has adopted for itself such an interdisciplinary way of thinking, and that the Legal Needs Assessment that you're going to conduct is going to be a socio-legal piece of work, and that we have anthropologists here at the conference as well as people from many other disciplines. I think that is an extraordinary thing that *you* should share with the world, and an example that I will take away from JSW Law and bring to other countries. An interdisciplinary and socio-legal approach to law is the only way that you will learn about how law can contribute to social and economic development and environmental sustainability.

The next two principles are: (7) Aim for public knowledge sharing in the public interest–and that follows from what I have said about the importance of a

public, democratic, deliberative discourse- and (8) Never follow pressures for short-term gains, which is a very salutary maxim. The desire for ‘quick wins’ comes from many quarters: politicians facing re-election, judges and bureaucrats who want to leave a ‘legacy’ before the end of their term, donors who want to advertise the impact of the projects they fund, and many others. All of that is understandable, and sometimes it is necessary to show quick results to build confidence among members of the public who have become weary of the slow pace of reforms. So a judicious and pragmatic approach is warranted, and investments which can bring an early return should certainly be encouraged, but not at the expense of adopting quick fixes to problems with complex structural roots.

And that brings me to the last maxim, (9) Primarily entrust this task to capable domestic academics, possibly in the context of international teams. So the domestic actors should be in the lead, but the fruits of all this need to be shared. They need to be shared within the country, and they need to become a public good. And this is why I am very happy to see a law school playing this role in Bhutan, because I am sure that it is part of your DNA to publish your research and to make available the fruits of your knowledge. But we also have a responsibility to share this knowledge internationally, and–through the responsibility to learn–what happens in Bhutan needs to add to our understanding about the role of law in promoting sustainable development worldwide.

The Importance of Teaching Humanities to Future Bhutanese Lawyers

Judith Stark[1]

I would like to thank the organizers of the GNH and Law Conference for asking me to contribute an essay on the central and critical role that the humanities and social sciences play in the curriculum at JSW Law, Bhutan's first and only law school.

The study of the humanities is considered the fundamental basis of a modern tertiary education. But is it necessary? This was a core question that faced the planners who designed JSW Law and its curriculum. "The students' time in law school is short," so the argument went. "Why waste time on subjects like Philosophy, Economics, or Political Science? Why not further emphasize law or have the students spend more time learning the Constitution?"

After all, we had looked for inspiration to the legal education systems of several other jurisdictions, foremost among them India, Singapore, the European Union, and the United States. These jurisdictions have come to very different conclusions on this question, owing to the differing approaches to legal education adopted in each country. The contrast–and the underlying reasons for the differing approache--is most easily identified by comparing the examples of the United States and India, two of the world's largest markets for legal education.

In my home country, the United States, legal education is a graduate course of study, focused on professional training of lawyers. Law students have already earned a four-year undergraduate degree, which often gives them a thorough grounding in the humanities. Therefore, American law schools focus almost exclusively on legal courses, reserving the humanities–if it appears at all–to upper-class elective subjects like "Law and Literature."

[1] Associate Dean for Library & Information Services and Senior Lecturer, JSW School of Law.

By contrast, in India–like in most of the world–legal education is an undergraduate course: students pursue a three-year Bachelor of Laws or a five-year joint Bachelor of Arts/Bachelor of Laws. In either case, students join the law school directly out of high school–a secondary-education experience that, in India, often involves a great deal of rote memorization and not a great deal of exposure to the humanities. As a consequence, Indian law schools–especially the five-year course–are mandated by the Bar Council of India to include courses in English, History, Political Science, Sociology, and Economics, and many top law schools supplement this list with additional courses in the humanities and social sciences. The Bar Council, one surmises, recognizes that these are important areas of study for Indian lawyers and law graduates, to which they would not otherwise receive exposure.

This was the dilemma facing the early planners of the law school–a diverse group of legal, business, and cultural leaders who formed the Programme Advisory Committee (PAC) and its successor, the law school's Governing Council. The first question, of course, was what does JSW Law aim to be and what does it want to teach its students? Once that decision was made, the second question was what role should the Humanities and Social Sciences play in our community and our curriculum?

The study of humanities and arts taps into something that is part of the essential human experience. It gives us a framework to understand the world in larger terms. By studying the human eternals, we learn more about what people are capable of–both the good and the bad. It lets us explore the bigger universal questions–Why are we here? What should I believe in? Who decides the tenets of law? What is law and who should it apply to?–by looking at how other peoples and civilizations considered these same questions and what they did about it. This type of comparison between past and present does ask students to consider the world around them in a slightly different and more nuanced way. These lessons might not be appreciated immediately, but when the students think about law and how it

impacts people, they hopefully will remember that the world is more than the sum of their individual experiences and they will draw on the knowledge gleaned in these courses.

But why do Bhutan's future lawyers and judges need to consider these bigger questions? Let us consider a hypothetical (mostly because it can't be a law conference without a hypothetical)--is there ever a situation so terrible that breaking the law is necessary to save oneself or others? What about murder? Is murder ever excusable to save oneself or others?

Instantly, most people will say, "No."

But what if you have to kill someone out of self-defense or defence of others?

What if you and three of your friends were on a boat in the middle of the ocean at least three days away from any help. There has been no food for at least two weeks, but there has been frequent rain. And, the only way that you and at least two of your shipmates could survive was to kill and eat the fourth shipmate. Let us be clear, you must kill and eat one of your shipmates to survive. If you don't kill the fourth, no one will survive. What do you think then?

Again, many people would say, "No. It's abhorrent behaviour. I would never consider it. Murder is wrong and cannibalism is worse."

But what if I tell you that usually people who have killed and eaten their shipmates have been exonerated under the law of necessity. These situations were so beyond what could be found to be normal that those people had been excused from any crime or conviction because they acted out of necessity of preserving themselves and others in an extreme version of utilitarianism.

Does that make your decision different? The fact that you wouldn't be convicted?

Let us add in more complications: say one of your shipmates, Robert Parker, drank sea water and was weaker every day. And, you knew that by killing him, the rest of you could eat him and live.

Some of you would say, "No, I wouldn't murder Parker to eat him. I might push him in the ocean." Others of you might say, "I don't know what I would do in that situation." And, still others of you might say, "I would do it."

This scenario is, of course, based on a famous case called *R. v. Dudley and Stephens*[2] that happened in the 1880s. There were four men on a lifeboat after their own boat had sunk in the middle of the ocean. There had been food in the beginning, but they soon ran out. Dudley realized that their best chance at survival was killing and eating one from the group. He talked about it frequently with two other men, Stephens and Brooks. Dudley did not talk about it with Robert Parker, their cabin boy. Parker was drinking sea water and was very ill. The men did talk about drawing lots to pick someone to die for the good of the others. However, Parker became weaker and Dudley, with Stephens help, killed him. The three remaining men ate Parker. Parker did not resist or fight off Dudley because he was in such a weakened state.

When they were then inconveniently picked up by a rescue boat, a mere four days later, all three survivors were found with evidence of what they had done.

Usually, people who had committed cannibalism in this kind of situation were not convicted because of the doctrine of necessity. However, in Dudley and Stephens's case, they were tried and convicted of murder because the court found that the law of necessity did not apply in this case–it was not strictly necessary to kill Parker. The men did not know that rescue was impossible. And, it is never strictly necessary to kill an innocent man like Parker who could not resist or even assent to give his life to save the others. If Parker had sacrificed himself for the others, that would be excusable. The men were convicted, but they only had to serve six months in prison. The third man, Brooks, was not tried because he did not participate in the killing nor did he consume much of Parker.

[2] *R. v. Dudley & Stephens*, 14 Q.B.D. (Div. Ct.) 273 (1884).

What about the third man, Brooks? By letting the other two murder Parker, isn't he just as complicit? Parker was an innocent boy. How can Brooks stand by and let this happen?

What if that happened here, in Bhutan? What if you were trapped on a mountain with a group of four people, no way down, and the only thing you could do to survive was to eat one of your group? What would you do?

Now, let us take a step back and look at what we just did.

By taking an example scenario, we are mining it to consider the implications of certain ethical and moral decisions. The next step would be to apply different philosophies to the court's decision that no man should be killed out of necessity–How would it work under utilitarianism? What would Kant say? What about under a theory of law and economics? Does our analysis change? The answer in some areas may surprise you.

At JSW Law, Philosophy, Economics, and Political Science are required classes in the standard curriculum. Every student must take those classes. While it is easy to think of them as dead subjects, irrelevant to the discussions of modern man, they're really not. These classes give our students the underpinnings they need to understand the consequences of certain decisions. The study of law examines the beliefs and ideas of a particular society at a particular moment in time. And necessarily so–the rules of law are flexible but fixed. There has to be a consistency and predictable outcome. As Professor Jeremy said, there's patterns to all the different forms of law; natural law, customary law, but the patterns have to be observed and considered to understand the system. But the humanities gives us the context necessary to broaden the students' understanding of the larger picture, the larger ideas, the larger system. We believe that these courses look at the wider world experience and awakens the mind to new ideas, new beliefs.

Law directly impacts people's lives. This requires looking beyond our own individual experiences to better understand what and how other people think. Humanities gives our students a lens into the past, into other civilizations, and lets

them use that lens to view the future and predict, based on their knowledge of what happened before and what is happening now, what will be.

Thank you.

Jigme Singye Wangchuck School of Law
GNH & Law Conference
17-18 July 2018

Schedule of Events

Tuesday, July 17, 2018

8:30am	Registration
9:20am	*Marchang* *Tashi Gyelpoi Soeldeb* *Zhabten* to His Majesty the Druk Gyalpo
9:40am	Welcome Sangay Dorjee (Dean, JSW Law)
9:50am	Opening Address Her Royal Highness Princess Sonam Dechan Wangchuck, Honourable President, JSW Law
10:05am	Photo Session
10:10am	Tea
10:50am	**Panel: Defining Bhutanese Customary Legal Traditions** Moderator: *Dasho* Lobzang Rinzin Yargay, Director-General, Bhutan National Legal Institute Panelists:

Dasho Kinley Dorji, Druk Journal: *The Intellectual and Historical Origins of GNH*

Rinzin Wangdi, JSW Law: *The Codification of Bhutan's Initial Laws in the 1950s*

Dasho Lungten Dubgyur, Royal Court of Justice, High Court: *Legal Transplants: Modernization or Dilution?*

Dasho Karma Ura, Centre for Bhutan & GNH Studies: *The Topic of "the Law" Across Over Two Decades of GNH Research at the Centre for Bhutan Studies*

2:00pm **Panel: Bhutan's Experience with GNH and the Law**

Moderator: Michael Peil, JSW Law

Panelists:

Lyonpo Sonam Tobgye, former Chief Justice of Bhutan: *The Bhutanese Constitution Drafting Process*

Nima Dorji, JSW Law: *Bhutan's Constitution – A Comparative Perspective*

Stefan Hammer, University of Vienna: *Principles & Policies in a Written Constitution: Justiciability and Impact on the Legal Standing of the Citizens*

Wolfram Schaffar, University of Vienna: *Alternative Development Strategies Worldwide – Lessons for Lawyers*

Dasho Tashi Wangmo, Eminent Member, National Council: *Looking Ahead – Assessing Access to Justice in Bhutan – Opportunities and Challenges in the Coming Decade*

4:35pm 10th Anniversary Edition of the Bhutan Law Journal

Dasho Lobzang Rinzin Yargay, Bhutan National Legal Institute

4:45pm JSW Law's Research Centre and Bhutan Law Network
Kristen DeRemer, JSW Law

Wednesday, July 18, 2018

9:00am Welcome. Ugyen Thinley, JSW Law

9:05am Introduction for Celebrating Bhutan's Constitution
Lyonpo Tshering Wangchuk, Chief Justice of Bhutan

9:20am Celebrating Ten Years of Bhutan's Constitution
Lyonpo Sonam Tobgye, former Chief Justice of Bhutan

10:00am Questions

10:45am **Panel: Buddhist Lessons for the Legal Profession**
Moderator: Prof. Michaela Windischgraetz, University of Vienna
Panelists:
Ngawang Sherub Lhundrup, JSW Law: *The Relevance of Nyen-ngag (poetry) in the Education of Bhutanese Lawyers*
Rebecca Redwood French, University at Buffalo: *Is there Such a Thing as a Buddhist Legal Tradition?*
Dorji Gyeltshen, JSW Law: Tsema *as an Indispensable Key to Law*
Khenpo Sonam Bumdhen, Central Monastic Body:
Shera Lhundrup, Attorney General of Bhutan: *Practical Realities of Acting on a Buddhist Legal Ethic – a Practitioner's Perspective*

2:00pm **Panel: Legal Education in Bhutan: JSW Law's Approach Towards Educating Bhutan's Future Lawyers**

Moderator: Sangay Dorjee, JSW Law

Panelists:

Jeremy Webber, University of Victoria: *Teaching Indigenous Law in a "Modern" Jurisdiction*

Michael Peil, JSW Law: *JSW Law's Approach Towards Creating a GNH-Centric Law School Curriculum*

Pema Wangdi, JSW Law: *The Central Importance of Humanities Subjects for Bhutanese Lawyers*

Dema Lham, JSW Law: *Clinical and Experiential Legal Education at JSW Law*

3:25pm **Panel: Working Across National Legal Cultures: The Ethics and Challenges of Rule of Law Capacity Building Collaborations?**

Moderator: Stephan Sonnenberg, JSW Law

Panelists:

Dasho Kinley Dorji, *Druk Journal*

Dasho Tashi Wangmo, Eminent Member, National Council

Nick Booth, United Nations Development Programme

Sangay Dorjee, JSW Law

4:40pm Closing Address

Lyonpo Tshering Wangchuk, Chief Justice of Bhutan

5:00pm Vote of Thanks

5:10pm *Tashipai Moentshig* (Closing Prayer)